

1 STATE OF INDIANA)
) SS:
2 COUNTY OF DELAWARE)
3
 IN THE DELAWARE COUNTY SUPERIOR COURT
4
5 CRAIG DUNN and PHILIP WILEY,)
 et al.,)
6 Plaintiffs,)
)
7 -v-) CAUSE NO.
) 18D01-9305-CT-06
8 RJR NABISCO HOLDINGS)
 CORPORATIONS, et al.,)
9 Defendants.)

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11 VOLUME 10
 FEBRUARY 23, 1998
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1 MR. CASSELL: All rise.
2 (Jury not present)
3 THE COURT: Thank you, be seated.
4 Good morning, Counsel.

5 ALL: Good morning, Your Honor.
6 THE COURT: Plaintiffs appear in
7 person and by counsel. All defendants
8 represented this morning?
9 MR. OHLEMEYER: Yes, sir.
10 THE COURT: For the record, jury is
11 not now present. The Court has reviewed the
12 Henry deposition, bailiff will pass an order
13 on the admissibility of the Henry
14 deposition. And what the Court has done,
15 general objections were overruled.
16 Defendants' specific objections, part of
17 those were sustained, part of those were
18 overruled, and I'll pass an order which sets
19 those out.
20 While we're discussing depositions,
21 plaintiff intend to offer a deposition first
22 off this morning?
23 MR. PATRICK: Yes, Your Honor.
24 We're going to offer the transcript of
25 Dr. Jesse Steinfeld first, and then

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1 following that, I believe we will have some
2 live testimony.
3 THE COURT: How long will the
4 transcript take of the deposition?
5 MR. PATRICK: Approximately about
6 40 minutes.
7 THE COURT: 40 minutes. Now, that
8 is a transcript of Jesse Steinfeld. It is
9 not marked yet, Counselor?
10 MR. PATRICK: I don't believe --
11 the bailiff brought it to my attention that
12 it was not marked.
13 THE COURT: It would be --
14 MR. CASSELL: 28, Your Honor.
15 THE COURT: -- Plaintiffs' 28. You
16 have designated what parts you want to read,
17 Counselor?
18 MR. PATRICK: Yes, Your Honor, and
19 I believe you indicated your ruling on the
20 objections to those designations on Friday,
21 so we've marked it in compliance with your
22 ruling.
23 We do have one issue on two lines that
24 were inadvertently dropped off, I believe on
25 page 9375.

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1 THE COURT: 9375? All right.
2 MR. PATRICK: Yes, Your Honor, I
3 conferred with the defendants this morning.
4 Apparently what happened is we designated
5 the question and then left off the answer on
6 9375; lines 19 through 20 would be the
7 answer. They object and so we're raising it
8 before you.
9 The question is, begins on line 11 at
10 9375, there is then an objection, and then
11 the answer is given on lines 19 through 20.
12 MR. WAGNER: Can I be heard on
13 that?
14 THE COURT: Certainly, Mr. Wagner.
15 MR. WAGNER: The reason we object,

16 Your Honor, and for purposes of the record,
17 if Your Honor starts on 9374 at line 10, you
18 see they're asking there, and this was all
19 admitted by you, and you're saying that as
20 Surgeon General you were telling the
21 American people and so forth and he answers
22 that that is correct. And then the
23 question, Did the Tobacco Institute react
24 and so forth. And then answer, The Tobacco
25 Institute, and then a little colloquy there,

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1 and then on line 5 he answers that question.
2 So the question is actually answered and
3 then the next question is a characterization
4 of the preceding answer. So the answer is
5 already in as to that subject.

6 The question at line 11 is
7 objectionable because it's argumentative,
8 it's a characterization of the witness'
9 testimony. It's cumulative and it's already
10 been answered, in any event.

11 THE COURT: I agree. 11 through 20
12 will go out.

13 MR. WAGNER: Judge, point of
14 clarification. On depositions, are they
15 being marked as exhibits for purposes of the
16 record? I mean, usually all I've ever done
17 is just read them in.

18 THE COURT: We're going to mark
19 them as exhibits.

20 MR. WAGNER: Okay. Do they go to
21 the jury?

22 THE COURT: No.

23 MR. WAGNER: They're just marked?

24 THE COURT: Marked.

25 MR. WAGNER: Thank you, Judge.

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1 THE COURT: All right. For the
2 record, Plaintiffs' Exhibit 28 is offered
3 and admitted with the objections sustained
4 to Mr. Wagner. How do you intend to publish
5 this to the jury, Counselor?

6 (Plaintiffs' Exhibit(s) 28 received in
7 evidence.)

8 MR. PATRICK: Your Honor, I will be
9 reading the questions, Mr. Joe Young will be
10 reading the responses. And we had intended
11 to read not only our designations but that
12 of the defendants if that's acceptable to
13 them, unless they want to read their
14 designations.

15 THE COURT: Mr. Wagner?

16 MR. WAGNER: I think that's fine
17 with us, Judge. Just have them read ours.

18 THE COURT: All right.

19 Mr. Shockley?

20 MR. SHOCKLEY: Just a moment with
21 counsel, if I may.

22 THE COURT: Sure.

23 (A discussion was held off the record.)

24 THE COURT: Defendants filed a
25 joint motion for preliminary hearing on the

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1 admission of the testimony of plaintiffs'
2 expert, Thomas Murray, goes to status as an
3 expert. The Court will grant a hearing on
4 that issue, Counsel.

5 MR. WAGNER: Thank you, Judge.

6 Judge, I need to confer with Counsel
7 for a minute on a question on this Steinfeld
8 deposition.

9 THE COURT: Go ahead.

10 (A discussion was held off the record.)

11 THE COURT: Mr. Wagner, I think
12 filed -- I know he filed a motion for leave
13 to file memorandum in support of an
14 objection to plaintiffs' use of a privileged
15 draft memorandum regarding the witness
16 Bennett LeBow.

17 MR. WAGNER: Judge, I think that
18 does not -- what this relates to is a
19 document that the plaintiffs have indicated
20 they would use during Mr. LeBow's testimony.

21 THE COURT: Right. Do you intend
22 to do that, Counselor?

23 MR. PATRICK: I just received that
24 memorandum. I do know that Mr. Motley was
25 planning to use that exhibit. I will inform

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1 him to take that matter up before Mr. LeBow
2 goes on the stand. Unfortunately, he is
3 preparing for Mr. LeBow's testimony and is
4 not present here right at this point.

5 MR. WAGNER: We've got the in
6 camera submission, Your Honor, ready to go.

7 THE COURT: Do you have it ready?

8 MR. WAGNER: Yes. So we can file
9 that with you whenever.

10 THE COURT: I'll grant your
11 request, Counselor, to file a memorandum,
12 and I'll grant your request to file
13 objections in camera and under seal.

14 MR. WAGNER: I've got those now,
15 Your Honor. Shall I file them?

16 THE COURT: Very good.

17 MR. WAGNER: It has a little sealed
18 envelope and all that.

19 THE COURT: Thank you, Counselor.

20 Defendants filed their in camera
21 memorandum in support of its objections to
22 use of that draft memorandum filed under
23 seal. Court also noted the defendant filed
24 objections and counter-designations to the
25 testimony of Mr. Baumgartner which I haven't

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1 dealt with yet.

2 Plaintiffs filed argument in support of
3 the admission of the document 37935260 and
4 6045. That was filed this morning.
5 Plaintiffs' memorandum as to why the
6 transcript of June 30, '75 tape-recorded
7 interview of John Hill is admissible and
8 I'll deal with that as soon as possible.

9 Any other preliminary matters,
10 Counselor?

11 MR. PATRICK: One other thing, Your

12 Honor. We had prepared a limiting
13 instruction. I showed it to the defendants.
14 They had some additions to make. We've
15 included that.

16 THE COURT: As to?

17 MR. PATRICK: And this is as to
18 Dr. Steinfeld.

19 THE COURT: All right. Thank you.

20 MR. PATRICK: It's in handwriting.
21 I hope you can make it out.

22 THE COURT: All right. Bring in
23 the jury.

24 MR. CASSELL: All rise.

25 (Jury present)

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1 THE COURT: Be seated. Jury
2 appears in its entirety, together with all
3 three alternates. Good morning, ladies and
4 gentlemen. Sorry for the delay. I think
5 the bailiff indicated I had a couple
6 criminal matters I had to take care of this
7 morning and that caused the delay. I
8 apologize.

9 Ladies and gentlemen, we are ready for
10 the next piece of evidence from the
11 plaintiff. Out of your presence a
12 deposition has been admitted into evidence
13 as Plaintiffs' Exhibit 28. It's a
14 deposition of Dr. Jesse Steinfeld. I want
15 to tell you that this deposition will be
16 read by the attorneys.

17 But before we do that, ladies and
18 gentlemen, this testimony that you will next
19 hear is testimony that was given in another
20 proceeding and before the trial of this
21 case. Although the witness is not presently
22 in court, you are to give this testimony the
23 same weight as if the witness were
24 testifying live in court.

25 Testimony of the witness, Dr. Jesse

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1 Steinfeld, is offered by the plaintiff
2 against all defendants except for the
3 Defendants American Brands, Philip Morris
4 Companies, Inc., Lowes Corporation, RJR
5 Nabisco Holdings, Inc., and BAT.

6 You should not consider this testimony
7 as to these defendants, but you may consider
8 it and whatever weight it may be given as to
9 all other defendants in this case.

10 Counselor.

11 MR. PATRICK: Yes, Your Honor.

12 (Deposition read as follows)

13 Q Dr. Steinfeld, would you please tell the
14 ladies and gentlemen of the jury your full
15 name and your present address.

16 A Jesse Leonard Steinfeld. The address is
17 [DELETED]

18

19 Q You are a medical doctor?

20 A Yes.

21 Q At one time you were Surgeon General of the
22 United States; is that correct?

23 A That's correct.
24 Q I'll get to that point in time, but let me
25 take you through your medical education,
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1 background and training.
2 Where did you get your M.D. degree and
3 in what year?
4 A Western Reserve, Cleveland, Ohio. The year
5 was 1949.
6 Q Are you board-certified in the field of
7 internal medicine?
8 A Yes, I am.
9 Q Now, you were a professor of medicine at the
10 University of Southern California from when
11 to when? During what time frame?
12 A Well, I was assistant associate and then
13 full professor from, let's see, '59 through
14 the end of '67.
15 Q Now, when were you deputy director of the
16 National Cancer Institute?
17 A Beginning in '68 until mid-'69 or spring of
18 '69, when I was asked to move downtown as
19 acting deputy, assistant secretary, for
20 Health and Scientific Affairs.
21 Q That was for the Department of Health,
22 Education and Welfare?
23 A That is correct.
24 Q And how long were you assistant secretary
25 for Health and Scientific Affairs for the
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1 Department of Health, Education, and
2 Welfare?
3 A Well, I was deputy assistant secretary. I
4 had that position and then in November or
5 December of that year became Surgeon
6 General, so I held both positions until I
7 was no longer Surgeon General or deputy
8 assistant secretary. And that was in
9 January of '73.
10 Q When did you become Surgeon General of the
11 United States?
12 A November or December of '69.
13 Q And you served as Surgeon General of the
14 United States until when?
15 A The inauguration date of President Nixon's
16 second term, January of '73.
17 Q Okay. I'm going to come back to your role
18 as Surgeon General, but I want to ask you
19 some more questions generally about what you
20 have done in your medical career.
21 Now, you were a professor of medicine
22 and oncology in Mayo Medical School in
23 Rochester, Minnesota; is that correct?
24 A That's correct.
25 Q Now, Dr. Steinfeld, you were the President
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1 of the American Society of Clinical
2 Oncologists, and when was that?
3 A I believe that was '71.
4 Q Okay. The definition of oncology is what?
5 A Study of tumors. Onco, I think, is tumor,
6 and oncology would be the study of tumors.
7 Q Now, in terms of your medical career, you

8 were the Dean of the Medical School of
9 Virginia, I believe that was from 1976 to
10 1983?
11 A That's correct.
12 Q Now, during that time frame, were your
13 duties essentially administrative as opposed
14 to patient care?
15 A Yes. There's a lot of administration in
16 medicine. There's even more now.
17 Q Then after you left as dean of the Medical
18 School of Virginia, you became president of
19 the Medical College of Georgia from 1983 to
20 1987; is that correct?
21 A 1984 -- yes, 1983 to 1987. Yes.
22 Q Dr. Steinfeld, when you were Surgeon General
23 of the United States, was it your primary
24 task to safeguard the public health?
25 A Yes.

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1 Q Let me get to -- what I'm asking you now is
2 have you seen the Frank Statement before?
3 A Yes, but I would like to read it if you
4 are --
5 Q Now, to get back to my question, the
6 statement in the Frank Statement, "We have
7 always and always will cooperate closely
8 with those whose task it is to safeguard the
9 public's health." And my specific question
10 to you is: When you were Surgeon General of
11 the United States, did Philip Morris, RJ
12 Reynolds, Lorillard, and Brown & Williamson
13 cooperate with you as Surgeon General?
14 A No.
15 Q When you were Surgeon General of the United
16 States, as part of your official duties, did
17 you have occasion to identify what you
18 considered to be the number one public
19 health problem in America?
20 A Well, not only the number one public health
21 problems, but any serious public health
22 problem, yes.
23 Q What did you characterize officially and
24 publicly during your term of office, as the
25 number one public health problem facing

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1 America?
2 A Cigarette smoking. I would add that my
3 first act as principal deputy assistant
4 secretary was to take a position -- of the
5 Public Health Service -- take a position
6 that fluoridation of water was a good idea,
7 because 98 percent of the American
8 population had caries, which is not a fatal
9 disease. And since water had been
10 fluoridated and added to toothpaste, a
11 number of dental schools had gone out of
12 business.
13 So there were other problems obviously.
14 Q Did you come up with a -- something called a
15 Bill of Rights for the Nonsmoker?
16 A I didn't come up with a Bill of Rights. I
17 suggested during a speech, I believe to the
18 Interagency Council on Smoking and Health in

19 1971, and I can't remember the exact words,
20 but I think you have them, in the last
21 paragraph, and I said it was high time to
22 interpret the Bill of Rights for the
23 nonsmoker who has -- should have a right to
24 clean air. And I can't remember the exact
25 wording, but that was the gist of it.

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1 Q In 1971, as Surgeon General of the United
2 States, did you take a position with respect
3 to whether cigarette smoking should be
4 banned on airplanes and other places?

5 A Well, I felt, yes, that involuntary smoking,
6 which is what some people call passive
7 smoking, but unless one wishes to die, one
8 must breathe. And if there is a cigarette
9 smoke in the air, then one becomes an
10 involuntary cigarette smoker, as opposed to
11 the person who is lighting up and actually
12 smoking a cigarette. That would be a
13 voluntary cigarette smoking.

14 Q Now, Dr. Steinfeld, you had occasion to make
15 a speech and write an article in 1972 called
16 the Surgeon General Reports: Where the
17 Anti-Smoking Campaign Stands in 1972.

18 And what is this document you have in
19 your hands?

20 A It says Bulletin on National Tuberculosis
21 and Respiratory Disease Association,
22 May 1972.

23 Q Is that an article you wrote, a speech you
24 made, or both?

25 A I believe it's an article called the Surgeon

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1 General's Reports: "Where the Anti-Smoking
2 Stands in 1972."

3 Q I'd like to ask you a specific question
4 about that.

5 A Okay.

6 Q Dr. Steinfeld, do you remember in 1972
7 giving a press briefing for the opening of
8 the National Education Week on Smoking?

9 A I guess I did. I can't remember that
10 specifically.

11 Q Well, why don't you -- maybe this will
12 refresh your -- what I've marked in ink
13 there.

14 Read it to yourself.

15 A Yes.

16 Q And what point were you making during the
17 press briefing about cigarette smoking and
18 health?

19 A I made the point or hoped that in the next
20 year, each American citizen would review for
21 him or herself the summary of findings about
22 smoking. I said, There's no longer an
23 honest disagreement among medical scientists
24 about the hazards of cigarette smoking.
25 There is no disagreement.

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1 I said, Smoking is deadly.

2 Q And you're saying that as Surgeon General in
3 1972, you were telling the American people

4 there was no honest disagreement among
5 scientists as to the health hazards of
6 cigarette smoking?
7 A That is correct.
8 Q And did the Tobacco Institute -- did the
9 tobacco industry react in 1972 to those
10 statements by you to the American people?
11 A The Tobacco Institute --
12 Q Page 9375 line 5.
13 A The response was, once again, either the
14 Surgeon General or the Department of Health,
15 Education and Welfare has failed to inform
16 the American public of disagreements among
17 some scientists and has continued its
18 process of, I guess, misinformation or
19 disinformation.
20 Q Dr. Steinfeld, from a public health
21 standpoint, when the public health community
22 decides, as you do, decided in 1972, that
23 cigarette smoking is hazardous to health,
24 from a public health standpoint, do you have
25 to know the precise mechanism in cigarettes

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1 or in tobacco smoke which causes cancer, or
2 is it enough from a public health standpoint
3 to simply know cigarettes cause cancer?
4 A It's enough from a public health standpoint
5 to know that cigarettes cause cancer. And I
6 would like to use an analogy.
7 Q Go ahead.
8 A Which I may not get exact, because it was
9 the first year I was in medical school in
10 1945.

11 It had to do with, I believe, an
12 epidemic of cholera in London, and a
13 physician named John Snow, who studied the
14 various people who developed cholera. And
15 he decided that there was a well that was
16 contaminated. I think it was called the
17 Broad Street Pump.

18 In any event, he removed the handle
19 from the well, and the cholera epidemic
20 subsided. I believe that was before the
21 general theory of disease had been
22 discovered.

23 So he, by removing the cause, without
24 knowing exactly what the cause was, was able
25 to abort -- not abort, but to stop an

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1 epidemic.
2 Q He knew that there was a connection between
3 the water and the cholera, so he turned off
4 the faucet?
5 A He took the handle off the well, you know,
6 the pump.
7 Q And that eventually solved the problem?
8 A Yes, after. The cholera can be transmitted
9 from person to person. After it -- it
10 stopped people from drinking water that was
11 heavily contaminated with cholera vibrio,
12 which had not been discovered at that point,
13 the bacillus, because they hadn't discovered
14 any bacillus.

15 Q Was secondhand smoke treated, from a public
16 health standpoint in terms of your ability
17 to take action, was it treated the same as
18 or differently from, let's say, some
19 occupational toxin or some environmental
20 agent, which you thought was a health
21 hazard?

22 A Secondhand smoke, and even primary smoke,
23 was not subject to the jurisdiction of any
24 agency that I was aware of, not the Food and
25 Drug Administration, not the Federal Trade

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1 Commission. Not anybody. I believe it was
2 not included in the Food, Drug, and Cosmetic
3 Act of 1906 or 1908, which regulated the
4 purity of foods and drugs and cosmetics, so
5 there was no option in terms of taking
6 action, other than to urge the American
7 people to take social action themselves.

8 Q Let me understand this. In 1971, 1972,
9 you're Surgeon General of the United States,
10 you would like to see smoking banned on
11 airplanes and other forms of public
12 transportation.

13 Well, why didn't you have the power to
14 make sure that that was done? You're the
15 number one public health official in
16 America. That's what you want to do. Why
17 couldn't you do it?

18 A Well, the one instance where I could do it
19 would be if it were an eminent hazard to
20 public health, that is, something that would
21 kill within a couple of minutes or a couple
22 of days.

23 Cigarette smoking results in diseases
24 after a considerable period of time, in most
25 instances, although one can show acute

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1 changes in carboxyhemoglobin and in the
2 exercise tolerance, et cetera, but there was
3 no authority vested in the office that would
4 have allowed the banning. Nor was there, I
5 would say, in any other office in the
6 Federal Government.

7 Q Now, to become Surgeon General of the United
8 States, how does that work? Is that a
9 presidential appointment?

10 A It's a presidential appointment, yes.

11 Q Now, you were appointed by President Nixon?

12 A Yes.

13 Q Had you ever known President Nixon before he
14 appointed you?

15 A I had never met -- I had never met President
16 Nixon before.

17 Q Was your Presidential appointment as Surgeon
18 General of the United States a term
19 appointment or a political appointment?

20 A It was a term appointment.

21 Q Okay. So as a practical matter, does that
22 mean, like in today's context, that if
23 President Clinton decided to fire his
24 Secretary of Health and Human Services, he
25 could just do that?

1 A Well, yes.
2 Q Okay. Whereas with a term appointment,
3 ordinarily he could not?
4 A He could not do it as easily, because, in
5 essence, he has the resignation in his hands
6 at his pleasure and for the time being.
7 Q Okay. Now, you were Surgeon General of the
8 United States when the 1972 Surgeon
9 General's Report came out; correct?
10 A Yes.
11 Q What did the 1972 Surgeon General's Report
12 say on the subject of secondhand smoke?
13 Again, not word for word. Just what, if
14 anything, was mentioned about it?
15 A There was a chapter on secondhand smoke
16 which was the first time there had been a
17 chapter on secondhand smoke.
18 Q Was it you who made the policy decision that
19 there would, in fact, be included in the
20 1972 Surgeon General's Report a chapter on
21 secondhand smoke?
22 A Yes, it was.
23 Q So you're the man who made the decision to
24 appoint someone to write that chapter?
25 A Yes. I told -- Dan Horn was the overall

1 author, coordinator of the report, and he
2 had a very small staff in his office, and
3 John Holbrook was a member of that staff.
4 Q Now, Dr. Steinfeld, had secondhand smoke, to
5 your knowledge, ever been mentioned in a
6 Surgeon General's Report before 1972?
7 A Boy, I don't know every word in it. I can't
8 say. I doubt it, but I don't know.
9 Q Okay.
10 A I think the sidestream smoke and the smoke
11 that the person expels from their mouth
12 after inhaling, its composition had probably
13 been described in earlier reports, but I
14 believe that the chapter that Dr. Holbrook
15 wrote was the most complete description.
16 Q Now, before the 1982 Surgeon General's
17 Report was published, you had made public
18 your position about wanting to ban smoking
19 on airplanes and other forms of public
20 transportation; is that correct?
21 A I will have to answer that in a little
22 more --
23 Q Sure, go ahead.
24 A -- detail.
25 As Surgeon General, I was responsible

1 for issuing the report each year to
2 Congress. That was --
3 Q Required?
4 A -- a requirement. And I made speeches
5 around the country to various groups. But
6 it seemed to me I was seeing the same faces
7 and I was preaching to the converted, and it
8 occurred to me that we were getting nowhere.
9 We were doing more and more research.
10 We were moving a decimal point. We were

11 adding additional -- that is, how many
12 people get what. We were adding additional
13 diseases to those already known to be caused
14 by cigarette smoking.

15 And I thought we should use the same
16 mechanism that the industry itself used,
17 which was social action, peer pressure. And
18 I suggested that in the speech earlier,
19 which I couldn't remember the exact words
20 that I used. In addition to that, because
21 of the British perinatal study, because of
22 the fact that children, infants under the
23 years of three years of age, particularly
24 under a year and a half of parents who
25 smoked had a higher incidence of

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1 hospitalization for respiratory diseases and
2 pneumonia, and had a higher incidence of
3 them altogether, had more severe asthma, it
4 was obvious that smoking had effects beyond
5 the person who was smoking.

6 So my intent was to get social action
7 on volunteer groups and to stimulate
8 research on secondhand smoke, to stimulate
9 research on its relationship to respiratory
10 disease, heart disease, cancer, et cetera,
11 and that was my intent.

12 But at the same time, because we
13 already knew that it aggravated people who
14 were allergic and caused discomfort, I
15 advocated that, in closed public places
16 without adequate ventilation that it would
17 be advisable to not allow smoking. There
18 would be other places to smoke.

19 Q Okay. Dr. Steinfeld, during your tenure as
20 Surgeon General, was smoking banned in now
21 federal offices or agencies?

22 A As I remember, and it's a long time ago, we
23 did issue a statement in the Federal
24 Register which said that there would be no
25 smoking in conference rooms and HEW, Health,

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1 Education and Welfare, or in conference
2 rooms owned by the GSA, General Services
3 Agency, or rented by them. I believe that I
4 remember that.

5 Q The General Services Administration owned
6 and rented out a lot of buildings?

7 A Oh, yes. That's where the taxes go.

8 Q And during your administration, smoking was
9 banned in buildings that GSA owned and
10 rented?

11 A I would say in the first Nixon
12 administration, part of it, yes. But I
13 might add it was honored more the breach
14 than in the observance.

15 Q But that was the policy?

16 A Yes.

17 Q Now, has any subject from a public health
18 standpoint been studied as much and
19 researched as much over the years as has
20 been the subject of tobacco and health?

21 A Not to my knowledge.

22 Q Doctor, you've been asked some questions
23 about your 1990 -- excuse me, 1971 call for
24 a ban on smoking in public places. Do you
25 recall that?

3085

1 A Yes.

2 Q Now, that was part of what you called your
3 request for a nonsmokers' Bill of Rights;
4 isn't that true?

5 A Yes.

6 Q And at the time in January 1971, when you
7 issued that call, you couldn't say with
8 certainty, could you, that ETS caused any
9 serious illness in adult nonsmokers?

10 A No, but I could say that it contained the
11 same constituents that were present in the
12 smoke that smokers inhaled that did cause
13 multiple diseases.

14 Q And you acknowledged to Congress in April of
15 1971, did you not, sir, that neither you nor
16 anyone else could determine whether smoking
17 in public places was a substantial health
18 hazard to a normal healthy adult.

19 A That is correct. If I didn't add, I should
20 have added that I was really urging that
21 research be done on the subject because
22 biologically it had to be. In fact,
23 biologically, it would be almost impossible
24 not to be harmful.

25 Q And one of the things you wanted, in

3086

1 addition to research, Doctor, isn't it also
2 true one of your purposes in calling for a
3 nonsmokers' Bill of Rights is to make
4 smoking socially unacceptable?

5 A That is correct.

6 Q And you have testified and acknowledge that
7 that was your intent, to make smoking
8 socially unacceptable in a number of places,
9 isn't that true, sir?

10 A That is correct.

11 Q Isn't it also true, Doctor, that you said
12 you advocated a ban on smoking in public
13 places that weren't properly ventilated?

14 A Yes, at the beginning, yes.

15 Q And in order to determine whether anyone got
16 lung cancer as a result of involuntary
17 smoking, it would likely be necessary to
18 know the level and the extent of exposure of
19 that person to environmental tobacco smoke;
20 right?

21 A Well, it would be important to know that the
22 person was, in fact, exposed, yes. And it
23 would be important to know as much as one
24 can and just is true in all of medicine and
25 so --

3087

1 Q And that would include the intensity of the
2 exposure, correct, how much environmental
3 tobacco smoke they were exposed to --

4 A Uh-huh.

5 Q -- at a given time?

6 A Uh-huh.

7 Q You would need to know how long a period of
8 time that person may have been, to use your
9 term, involuntarily smoking --
10 A Uh-huh.
11 Q -- environmental tobacco smoke?
12 A Uh-huh, and under what circumstances.
13 Q Under what circumstances. And you would
14 also have to know, would you not, what other
15 risk factors for lung cancer that individual
16 had been exposed to in order to make a
17 determination as to the cause of the lung
18 cancer?
19 A Yes. Was the person a uranium miner, an
20 asbestos worker, shipyard worker, was the
21 person involved in chromates, mining, you
22 know, or even refining. Although I think
23 all of those, at least in this country and
24 perhaps in other developed countries have a
25 fair number of regulations associated with

3088

1 the actual working.
2 Q Dr. Steinfeld, how many risk factors for
3 lung cancer are you aware of from the
4 medical literature?
5 A How many?
6 Q How many. If you don't know exactly,
7 ballpark figure.
8 A Been a long time. I really can't give you a
9 good figure. When I first got into this
10 field, which was 1950, trauma was considered
11 a cause of cancer. Scarring after --
12 Q Burning?
13 A -- burning was considered to be one of the
14 causes of cancer, yeah, after burns because
15 sometimes tumor would appear on the side of
16 the burn. Patients with tuberculosis, which
17 was fairly common during the early part of
18 the century, many times or a number of times
19 where carcinoma developed in tuberculosis
20 scars, so-called, that may have been
21 misdiagnoses. I think there are a number of
22 chemicals, although I can't remember
23 specifically which ones which may be
24 associated, so there may be a significant
25 number, I can't pick, that are, you know,

3089

1 rare etiologies of lung cancer. But I just
2 won't be able -- I would have to pluck a
3 number out of the air and I don't know what
4 it would be.
5 Q Okay.
6 A It would be more -- well over the few we
7 have discussed.
8 Q Any radiation would be a risk for lung
9 cancer?
10 A Any radiation that could get into the lung,
11 and cosmic radiation is highly penetrating
12 but it's -- again, we're talking about
13 concentration. For example, the early
14 radiologists, when we didn't know about it,
15 not only got cancers of their hands from
16 being exposed to radiation, but they used to
17 do fluoroscopy on patients repeatedly,

18 including medical students, and the
19 equipment wasn't what it is now and so some
20 people did get extensive radiation, and I
21 think some TB patients may have developed
22 some of their tumors not in a TB scar, but
23 perhaps related to radiation. So that's
24 possible.

25 Q Mr. Rosenblatt mentioned early on that you
3090

1 had brought some other materials with you
2 here today. What else have you brought to
3 this deposition today?

4 A I brought a list of the members of the
5 Tobacco Working Group.

6 Q What was that group? Tobacco Working Group
7 of what?

8 A Well, it says here Subcommittee of the Lung
9 Cancer Task Force. It seems to have grown
10 from when I was first a member of it, but
11 the Tobacco Working Group at one point was
12 the less hazardous cigarette group which
13 included academics, government scientists,
14 and all of the -- and the major tobacco
15 companies' research directors. And the idea
16 was to -- I remember T.C. Tso from
17 agriculture, may have been some other people
18 from other departments.

19 Q What time frame was this group that you're
20 referring to?

21 A This one says '69. I can't remember when
22 Ken Endicott first set it up, but he was
23 Director of the National Cancer Institute
24 and he was pressured always to do something
25 about the cigarettes. And his response,

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1 which was protective of the budget, as well
2 as a response, was to set up a group,
3 exchange information, try to identify the
4 toxic materials in tobacco, hopefully remove
5 them and make smoking less hazardous.

6 I attended the budget hearings with
7 him, and whenever he was asked, "What are
8 you doing about this problem," he would
9 describe this group.

10 Q Was this group active during the period of
11 time that you were the Surgeon General?

12 A Yeah. I stopped attending the meetings at
13 that point. I see my name scratched out
14 here. I can't remember whether I became a
15 member in '67 when I was still at the
16 University of Southern California, but I
17 know when I was deputy director in '68 that
18 I was a member. I was the only clinician.
19 They were mostly biochemists and virologists
20 and Hans Falk, Charlie Kensler.

21 Q And the group consisted also of people
22 representing the tobacco industry.

23 A Oh, yeah.

24 Q And one of the items that that group was
25 interested in, I think you said, was the

3092

1 creation of a so-called safer cigarette?

2 A I say less hazardous.

3 Q Dr. Steinfeld, at the time that one of
4 the -- at that time, one of the ways in
5 which you felt that a cigarette could be
6 made less hazardous would have been to
7 reduce the tar in the cigarette?
8 A Well, the first thing would be to identify
9 the toxic materials and there were a whole
10 number of chemicals that result from
11 combustion of any vegetable property. T.C.
12 Tso said 4,000, one other time he said 6,000
13 different chemicals. He was in agriculture.
14 Q Is it correct that one of the ways you
15 thought a cigarette would be made less
16 hazardous would be to reduce the tar levels?
17 A Well, it may be. Here is the problem I have
18 with the whole thing. This was under the
19 auspices of the National Cancer Institute.
20 We rarely got people from the Heart
21 Institute in there. I was concerned that if
22 we wanted to reduce the whole disease burden
23 that smoking might induce in a person, if we
24 removed, let's say, tar but we, at the same
25 time, increased carbon monoxide or some

3093

1 other constituent that would be harmful to
2 lungs in terms of emphysema or absorbed and
3 cause platelets to agglutinate and
4 contribute to heart disease, it won't be a
5 good thing. I had the only -- I had the
6 lonely voice.

7 Even now in the minutes it said,
8 "Steinfeld again said that we've got to be
9 sure that we are just not looking at cancer
10 and trying to develop a less hazardous
11 cigarette."

12 So the answer is tar would be an item
13 to look at, but then one would have to look
14 at what happened after the tar is removed in
15 terms of these other things.

16 And the first thing we need were
17 models, and there are lots of discussions as
18 to what kind of model you can use, not only
19 for lung cancer, but for other diseases.
20 There were subgroups set up to try to
21 develop these models.

22 Q Would you agree that you felt that even as
23 late as 1975, the available epidemiological
24 studies out there did not demonstrate that
25 lung cancer was caused by involuntary

3094

1 smoking?

2 A I probably said that. You're probably
3 quoting me.

4 Q You would agree that you probably said that
5 back then?

6 A Yeah. I think it takes time to collect
7 sufficient number of studies that are valid
8 in order to make a decision.

9 Q Have you reviewed any of the underlying
10 studies that the EPA relied upon in its
11 report on environmental tobacco smoke?

12 A No.

13 Q Are you aware of whether or not the EPA in

14 its study included all of the available
15 epidemiological studies that were out there
16 at the time they did the report?
17 A I was not a member of the committee, so I do
18 not know whether they reviewed everything
19 that was out there.
20 Q Okay. Are you aware of whether there have
21 been any epidemiological studies in the
22 United States about the effects of
23 environmental tobacco smoke that have come
24 out since the Environmental Protection
25 Agency report?

3095

1 A No, I'm -- no.
2 Q Do you know, Dr. Steinfeld, what the
3 reported relative risks for the relationship
4 between environmental tobacco smoke and lung
5 cancer were for any of the studies in the
6 EPA report?
7 A Talking about individual studies?
8 Q Yes.
9 A No, no, I can't give you individual data.
10 Q Do you know what the overall relative risk
11 was that the EPA reported for the
12 relationship between environmental tobacco
13 smoke and the development of lung cancer?
14 A I don't remember where it was on the page.
15 Q But as you sit here today, you don't recall?
16 A One and a half, but I wouldn't stake my life
17 on it.
18 Q You think it was in the area of one and a
19 half?
20 A (Witness nodding head)
21 Q I assume, Dr. Steinfeld, that you do not
22 consider yourself an expert in epidemiology?
23 A No, but I've used -- when I was working, I
24 used epidemiologic data in order to make
25 public policy decisions.

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1 Q You're familiar with the fact that in any
2 epidemiological study there needs to be a
3 confidence level.
4 A Uh-huh.
5 Q That is a sign to make the statistics
6 meaningful.
7 A Uh-huh, yes.
8 Q And you are aware of the fact that worldwide
9 recognized standard in epidemiological
10 studies, that confidence level be set at 95
11 percent?
12 A I think it may vary with the kinds of
13 studies that are being done.
14 Q Do you know for what kind of studies 95
15 percent would not be the recognized
16 standard?
17 A I don't know, but there are such.
18 Q Would you agree that it would be
19 inappropriate for anyone doing an analysis
20 of epidemiological studies to change the
21 confidence level that it applies to those
22 things after the studies are done?
23 A I'm not sure if you're talking about
24 Meta-analysis or not, but...

25 Q Well, let's talk about Meta. Are you
3097
1 familiar with what Meta-analysis is?
2 A Not really, no. I think one has -- I'm not
3 an expert on Meta-analyses. I do not know
4 that when there are lots -- many studies
5 with relatively small numbers of individuals
6 that there are statistical and other
7 techniques which enable the experts to group
8 them to come to conclusions that would not
9 be possible by looking at the individual
10 studies.
11 Q But you don't know whether it is appropriate
12 to use a different confidence level for a
13 Meta-analysis than a recognized standard; is
14 that correct?
15 A I would take the expert's interpretation of
16 the Meta-analysis.
17 Q Do you know what value for relative risk
18 determinations are recognized as significant
19 by epidemiologists?
20 A No. I am not an epidemiologist or a
21 statistician.
22 Q Okay. In other words, you wouldn't know --
23 you wouldn't have an opinion as to whether
24 or not a relative risk of one or two or
25 three or whatever would be a level that an
3098

1 epidemiologist would consider significant?
2 A One would not be, but --
3 Q But you don't know what that level would be?
4 A I do -- I don't know.
5 Q Okay. Would you agree that there are
6 inherent problems with finding cause and
7 effect relationships in epidemiological
8 studies?
9 A Epidemiologic studies alone can give one
10 clues.
11 Q But alone can't prove causation; is that
12 correct?
13 A No. I think one needs more than
14 epidemiologic studies.

15 MR. PATRICK: Your Honor, at this
16 time that completes the reading of the
17 transcript of Dr. Jesse Steinfeld.

18 THE COURT: All right. Thank you,
19 Counselor.

20 Your next witness, Mr. Motley.

21 MR. MOTLEY: Good morning, Your
22 Honor. We have some -- good morning, ladies
23 and gentlemen.

24 I butchered myself, Your Honor, this
25 morning. I've improved the economy of the
3099

1 drug stores in this fair community.
2 Your Honor, we have some document
3 issues related to the next witness that I
4 think both sides would agree need to be
5 addressed before we call him. I'm sorry,
6 but...

7 THE COURT: Ladies and gentlemen,
8 we need about ten minutes so I'm going to
9 have to ask you to step back into the jury

10 room before the next witness is called. You
11 can leave your notes on the chair if you'd
12 like. Don't talk among yourself about the
13 case. Thank you.

14 MR. CASSELL: All rise.

15 (Jury not present)

16 THE COURT: Jury is not now
17 present. There's an issue before the Court.

18 MR. MOTLEY: Yes, Your Honor.
19 First of all, before I get into the issue of
20 documents, the defendants filed a motion in
21 limine before we started this trial to
22 foreclose and you granted it, both sides
23 from discussing settlement matters, global
24 settlement matters, and also the Liggett
25 settlement matter. And I don't want to

3100

1 trespass on that. I would dearly love to
2 get into it, but my understanding is they
3 don't want us to get into it. Consequently,
4 I do not intend.

5 Mr. LeBow will be the next witness,
6 Your Honor, from Liggett.

7 THE COURT: Right.

8 MR. MOTLEY: And I don't intend to
9 get into it, unless they intend to get into
10 it, and which time I want leave to get into
11 it with both feet and fists flailing.

12 They are the ones that made the motion
13 in limine and I just want to make sure
14 that -- here is what I want. I want to
15 honor Your Honor's ruling and then sit down
16 and then let them stand up and start talking
17 about the Liggett settlement. If we're
18 going to talk about settlement, I want to
19 spread it all out in the record including
20 their admission that ETS causes cancer in a
21 class action lawsuit.

22 MR. OHLEMEYER: I don't want to
23 interrupt, Your Honor, but no such admission
24 has been made.

25 MR. MOTLEY: We'll see.

3101

1 THE COURT: All right. I think
2 what we have before the Court, defendants
3 have filed a motion in camera with a
4 memorandum regarding a document that we will
5 call the Jones Day memorandum. The document
6 is thought to be work product privilege.

7 Is that your thought in the matter,
8 Mr. Wagner?

9 MR. WAGNER: Yes, sir.

10 THE COURT: First of all, the
11 plaintiff intends to offer 30861, the Jones
12 Day memorandum?

13 MR. MOTLEY: Yes, Your Honor, we
14 do. And would you like for me at this time
15 to give you some procedural background?
16 Should they, since it's their motion, do you
17 want them to go first?

18 THE COURT: First of all, I just
19 wanted to know if you were going to try to
20 offer it.

21 MR. MOTLEY: Absolutely.
22 THE COURT: That being the case, I
23 will ask Mr. Wagner for any comment.

24 I have had a chance to review your
25 motion with the attachments, including the

3102

1 memorandum itself, the affidavit of the
2 person who prepared the memorandum.

3 Any other comment, Counselor?

4 MR. WAGNER: I think everything
5 that we need to say about that document,
6 Your Honor, we've submitted to you in the in
7 camera papers that we filed with you. And I
8 think they speak for themselves. And I
9 believe also the memorandum that is filed
10 with you along with that, I think, is also
11 self-explanatory.

12 THE COURT: All right. Thank you,
13 Counselor.

14 Mr. Motley, looks to me like it's work
15 product. What do you think?

16 MR. MOTLEY: It may well be work
17 product. It has been found to constitute a
18 crime and a fraud now by three different
19 courts of law.

20 And the other thing I would point out
21 under your rules, there's a substantial
22 need, even if it's work product, if there is
23 demonstrated a substantial need, the work
24 product privilege goes away.

25 But let me address the crime fraud

3103

1 issue, if I might, Your Honor.

2 THE COURT: All right.

3 MR. MOTLEY: Since the jury is not
4 present, there were a series of negotiations
5 that occurred between Liggett, if I can call
6 them that, actually the parent, the Brooke
7 Group, and various state attorneys general,
8 with respect to the position of Liggett in
9 the AG litigation. And as a result of all
10 of that, Liggett eventually agreed to
11 abandon its crime -- excuse me, its
12 attorney-client privilege as to certain
13 documents.

14 The document in question is a document
15 which was in the Liggett files. It was a
16 document that was generated, obviously, by
17 Jones Day, the national coordinating counsel
18 for RJ Reynolds. The Liggett documents,
19 Your Honor -- wait a minute.

20 A minute ago I said two courts had
21 found crime fraud -- three courts. Two
22 courts have found crime fraud. One court
23 has found public domain. That is, you don't
24 need to get to the issue of crime fraud
25 because the defendants placed it in the

3104

1 public domain and I'll get to that in a
2 moment.

3 Your Honor, Liggett waived its
4 attorney-client privilege, but as to
5 documents they thought that there would be a

6 joint, so-called joint defense privilege
7 asserted, they filed logs with various
8 courts. The so-called Liggett 8 documents
9 were teed up initially in an ETS case in
10 Mississippi where at the time I was chief
11 counsel. And they were the subject of some
12 hearings. But the real initial battleground
13 over these documents was in the state of
14 Florida, attorney general action.

15 The Liggett 8 documents were found by
16 the special master, by the trial court, and
17 by the Fourth District Court of Appeals in
18 Florida to constitute a crime and a fraud.
19 The evidence of a crime and a fraud such
20 that the attorney-client and work product
21 privilege would be vitiated and removed.

22 Thereafter, Your Honor, when the
23 defendants exhausted their motions for
24 reconsideration in the Fourth District Court
25 of Appeals in the state of Florida, they

3105

1 held a press conference before the
2 remitterer could issue from the Court of
3 Appeals which would cause the trial court
4 then to release the documents to the State
5 of Florida, including myself as trial
6 counsel.

7 The defendants held a press conference
8 and distributed these documents to hundreds
9 of members of the media who were there
10 before the remitterer came down. As a
11 result of that procedure of not protecting,
12 as the Court, the U.S. District Court in
13 Texas held, not treating them as if they
14 were the crown jewels and holding a press
15 conference in which they placed their spin
16 on the documents claiming the documents were
17 much ado about nothing, we actually got --
18 the State of Florida actually got our copies
19 of the documents from the media as opposed
20 from the defendants and from the Court.

21 Because of their conduct, the Court in
22 Texas didn't reach the issue of crime fraud.
23 They found that they were in the public
24 domain. Consequently, the documents were
25 liberated to be used by us in the Texas

3106

1 case.

2 So you have at least three rulings now,
3 and these documents have been widely
4 circulated, they're on the Internet. Your
5 Honor, I won't repeat these arguments I made
6 the other day about the Brown & Williamson
7 documents, but they're part of the
8 Congressional record now. They're part of
9 the proceedings before Congressman Bliley in
10 the House Commerce Committee, U.S. House of
11 Representatives Commerce Committee.

12 We believe the documents, without -- we
13 don't believe Your Honor has to reach the
14 issue of crime fraud and go through those
15 procedural requirements of us making a
16 showing, them rebutting, and then us

17 surrebutting. We believe this document, as
18 the Court of Texas has ruled, is, in fact,
19 in -- again, Your Honor, I only bring these
20 cases up just as a point of reference
21 because there's a history, as you've
22 learned, there's a history to just about
23 every one of these documents, procedural
24 history. So we don't believe that this
25 document is entitled to protection because

3107

1 it's in the public domain.

2 Therefore, if it's in the public --
3 it's an inadvertent disclosure, Your Honor,
4 the same analogous document that you ruled
5 on with the Brown & Williamson document.
6 It's in the public domain.

7 Secondly, Your Honor, if Your Honor is
8 not convinced of that, despite the fact that
9 it's in the Congressional record, it was
10 sent out by Congressman Bliley to virtually
11 every media in America, and, in fact, was
12 sent out by the defendants to virtually
13 every media in Florida and the national
14 press who were covering our jury selection
15 procedures in the state of Florida case.

16 If all of that doesn't persuade you,
17 then we believe there is a substantial need
18 here for us to have this document in this
19 case because the document addresses a very
20 important issue of additives. And what
21 additives --

22 And it also, in a footnote, it points
23 out that there was a, under the per number
24 of -- this is their words, not ours --
25 corporate misconduct, there's a whole

3108

1 section of this memo called "corporate
2 misconduct," and in a footnote in the
3 corporate misconduct section they refer to
4 the fact that the research and development
5 director of Lorillard --

6 MR. WAGNER: Your Honor, I would
7 object to discussing --

8 THE COURT: I don't want to talk
9 specifically about the document yet,
10 Mr. Motley.

11 MR. MOTLEY: Okay, Your Honor.

12 If one were to look at the Internet,
13 one could read the footnote to which I
14 refer, but I won't comment on it other than
15 to say that that footnote has been found
16 persuasive now by -- all the way up to a
17 court of appeals level, that that footnote
18 and the discussions within that body of that
19 particular part of the memorandum constitute
20 crime and fraud.

21 Your Honor, there is going to be
22 another -- a series of other documents that
23 will come up today, and I took this time to
24 spread that procedure on the record for Your
25 Honor because there are other documents that

3109

1 will come up in the course of this trial

2 that are part of the so-called Liggett 8
3 which, Your Honor, the Liggett 8 are part of
4 the so-called Liggett 834, which were
5 documents found crime fraud by the Court in
6 Minnesota. And then subpoenaed by
7 Congressman Bliley and placed in the public
8 record of the Congress of the United States
9 by Congressman Bliley.

10 THE COURT: Mr. Wagner.

11 MR. WAGNER: Yes, Your Honor. I
12 would just like to repeat something that I
13 think I have said at least a half dozen
14 times, and that is that it's always been my
15 understanding that trials like this are
16 based upon what's in the record in this
17 case, and Mr. Motley's continued
18 descriptions of what has happened in other
19 cases is just that. It's Mr. Motley's
20 descriptions of what has happened in other
21 cases. It's not in the record in this case,
22 and I don't want to even comment on that.
23 I'm not personally familiar with all those
24 proceedings and couldn't, even if I wanted
25 to.

3110

1 The only thing that I do know is true,
2 at least I've been advised is, that this
3 document was released through Liggett.

4 THE COURT: Through Liggett?

5 MR. WAGNER: Yes, sir.

6 MR. MOTLEY: That's absolutely
7 incorrect. That's totally incorrect. It
8 was released by a press conference held by
9 Philip Morris. Totally incorrect.

10 THE COURT: My question was going
11 to be did your client release this document?

12 MR. WAGNER: No, sir.

13 MR. MOTLEY: Yes, his client did.
14 They participated in the press conference.

15 MR. WAGNER: Let me ask Mr. Koethe
16 who knows far more than I do.

17 MR. KOETHE: I believe that is
18 correct, Your Honor.

19 THE COURT: What is correct?

20 MR. KOETHE: That the documents
21 were ordered to be turned over by the court
22 in Florida, and the documents were released
23 by one or a number of the defendants in
24 connection with that order.

25 MR. MOTLEY: That's totally

3111

1 incorrect. And found to be incorrect.

2 THE COURT: Let me let him finish.
3 Go ahead, Counselor.

4 MR. KOETHE: Well, I'm not sure,
5 have I addressed your question?

6 THE COURT: Well, I'm still not
7 sure what defendants released this. This is
8 a document prepared by Counsel for RJ
9 Reynolds. Did RJ Reynolds release the
10 document?

11 MR. KOETHE: I believe that is
12 true, Your Honor.

13 THE COURT: Did they do that only
14 as a result of the court order in Florida?

15 MR. KOETHE: It was done, to the
16 best of my knowledge, at or about the time
17 of that court order. I don't know that the
18 court order specifically required them to
19 produce the document or make the document
20 available. It required the parties to turn
21 or -- well, I'm not sure I can answer the
22 question other than to say that I believe RJ
23 Reynolds did publicly release the document.
24 And it happened at or about the time of the
25 Court's order in Florida.

3112

1 MR. MOTLEY: May I hand up the
2 Court's order of Texas that goes into
3 exactly what happened, Your Honor?

4 THE COURT: We're talking about in
5 Florida.

6 MR. MOTLEY: I understand that,
7 Your Honor, but the Court in Texas --

8 THE COURT: All right. Let me have
9 it.

10 MR. MOTLEY: -- found that they
11 held a press conference before they were
12 required to release it.

13 THE COURT: Thank you, Counselor.

14 MR. MOTLEY: By the way, Your
15 Honor, those documents were released by
16 joint press conference by Philip Morris and
17 RJ Reynolds.

18 THE COURT: Mr. Wagner, let me ask
19 you if, in fact, RJ Reynolds released the
20 document, what does that do to your work
21 product and attorney-client privilege?

22 MR. WAGNER: If it was released
23 under a form of compulsion, whatever that
24 was, pursuant to a court order or a subpoena
25 or some such, I don't think it does anything

3113

1 to it. But, again, I'm not, frankly,
2 personally 100 percent sure exactly how it
3 got into the public domain.

4 But, Judge, let me just -- and that is
5 an important point, but let me -- can I just
6 address a couple of other points?

7 THE COURT: Please.

8 MR. WAGNER: Even a cursory review
9 of this document will show you that it is
10 nothing more than a think piece that was put
11 together by the Jones Day lawyers. It was
12 put together at a time when the Jones Day
13 firm was first getting into tobacco
14 litigation. It contains -- and I'm not
15 going to say exactly what it contains, but
16 the substance of what it contains is
17 theories, ideas, strategies, the typical
18 kinds of things that lawyers do when they
19 get involved in lawsuits. It's a think
20 piece. It's not any kind of an admission by
21 a party in this case because it's a think
22 piece by lawyers for a party.

23 So on its face, in addition to the

24 privilege and work product objections that
25 we have, it's not relevant to any of the

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1 issues in this case and it's hearsay.

2 How could -- if I would write something
3 down, Your Honor, if I was representing
4 Mr. Cassell, for example, in a lawsuit and I
5 wrote something down that theorized about
6 how I was going to defend Mr. Cassell's case
7 in his lawsuit, how could that be an
8 admission against Mr. Cassell? And that's
9 essentially what this is.

10 It's purely and simply a think piece
11 that was put together by attorneys.

12 It's clearly work product on its face.
13 And it doesn't have any relevancy to
14 anything in this case because of the very
15 nature of this document. And it's not --
16 it's not an admission of a party.

17 It's the musings, if you will, and
18 theorizing and strategizing by attorneys for
19 a party. And it doesn't take very long to
20 see that just by looking through the
21 document.

22 There is another thing about the
23 document. It's essentially, as Your Honor
24 will see, about additives and ingredients.
25 This case is not about additives and

3115

1 ingredients. I mean, this whole paper
2 focuses upon that subject, as being one of
3 the theories that they would have to deal
4 with. So that's what the piece is all
5 about, for the most part, and that's not
6 even an issue in this case.

7 So, Judge, we have all of those things
8 which make this document objectionable. The
9 jury is going to be confused by what this
10 document is, if it hears it. It's going to
11 be misleading to the jury. It's going to be
12 prejudicial to RJ Reynolds. And if it had
13 any minimal probative value, which it does
14 not, Your Honor ought to keep it out on
15 those grounds because the jury is never
16 going to understand these fine points that
17 we're trying to make and what exactly this
18 document is. And so for all those reasons,
19 we think it's objectionable.

20 THE COURT: So your argument,
21 Mr. Wagner, if I understand it, even if RJ
22 Reynolds may have released that, and even if
23 we could consider that to be a waiver of the
24 attorney-client privilege, we're still
25 talking about a work product issue here.

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1 MR. WAGNER: Yes, sir.

2 THE COURT: Waiver doesn't have
3 anything to do with that.

4 MR. WAGNER: Yes, sir. And
5 relevancy objections, the fact that it's not
6 an admission of a party, it's a think piece
7 by a party's attorney, all of those go to
8 the objections that we've made and need to

9 make and have made.

10 MR. KOETHE: Your Honor, may I
11 please just add one piece of information for
12 the Court?

13 THE COURT: Yes, sir.

14 MR. KOETHE: I do think that the
15 issue of who released this and when it was
16 released is really a side issue that the
17 Court does not need to address to determine
18 if this document ought to be inadmissible.

19 As I understand, having further
20 conferred, in essence the Court in Florida
21 ruled that this document was not subject to
22 whatever privilege was being raised down
23 there. The Court indicated that these
24 documents were going to be released to the
25 public at a certain point in time and the

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1 defendants, shortly before that time, made
2 the documents available. So that may be a
3 relevant factor as to whether there's a
4 waiver here or not.

5 But I think the important issue is,
6 without going into too much detail of what
7 we've submitted to you, that this document
8 would lead down the path of requiring
9 further and further and further waivers and
10 compelled waivers of work product issues
11 because I think, as our piece points out,
12 there is information contained in that
13 memorandum which later turned out to be
14 inaccurate and that information was
15 subsequently changed.

16 And an order to require the defendants
17 to put that document in context would
18 require further waiver of the work product
19 privilege. It would confuse this jury. It
20 relates to issues that don't really have
21 anything to do with the matters before the
22 Court here and that this jury has to decide.

23 So we'd request, not solely on the
24 ground of waiver but on the grounds of
25 relevance, confusion, that the document

3118

1 ought to be excluded.

2 THE COURT: Counselor, identify
3 yourself for the court reporter.

4 MR. KOETHE: Yes. Paul Koethe,
5 Jones Day, I represent RJ Reynolds Tobacco
6 Company.

7 THE COURT: Thank you.

8 Mr. Motley.

9 MR. MOTLEY: Yes, sir, Your Honor,
10 I'll be brief. Try to be brief.

11 As the Court in Texas found, Your
12 Honor, holding a press release prior to the
13 remitterer coming down and publicly
14 themselves distributing these documents with
15 their own personal spin on it is
16 inconsistent with the claim of work product
17 protection.

18 Your Honor, Texas didn't find this
19 release to be a side issue. It found it to

20 be at the hub, at the core of the claim that
21 they had themselves placed this in the
22 public domain.

23 If I can address, Your Honor, the other
24 issues of relevance.

25 THE COURT: Go ahead.

3119

1 MR. MOTLEY: First place, Your
2 Honor, an agent of a party can, in fact,
3 make a statement that can be used against
4 the party if it's in the course and the
5 scope of the agency. I didn't hear any
6 claim that this was not in the course and
7 scope of the agency.

8 Secondly, Your Honor, the document
9 itself is not just a think piece. It is
10 sprinkled, when you look at it, Judge, it is
11 sprinkled with references to other corporate
12 documents and correspondence among and
13 between the defendants, including a document
14 that demonstrates that these defendants were
15 acting with a mutuality of interest, a
16 concert of interest, which is part of our
17 conspiracy claim in this case, Judge. That
18 they marched in lock step with respect to
19 whether or not they would release
20 information about additives. And whether
21 they would, Judge, even test additives.

22 Counsel said that's not relevant. But
23 the failure to test ingredients of a product
24 is relevant to a product liability claim in
25 the State of Indiana.

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1 And this document -- again, I won't
2 refer to the specifics of it, but this
3 document refers to not only the failure to
4 make a test, but the --

5 And, Judge, I would like to pass up the
6 press release that the, not just RJ
7 Reynolds, but all of the defendants handed
8 out. I thought it rather odd at the time,
9 but Philip Morris was participating with RJ
10 Reynolds. That's their press release they
11 put out on the courthouse doorsteps.

12 And, judge, as an officer of the court,
13 I'm telling you I got my copy as chief trial
14 counsel for the State of Florida from the
15 media and not from the Court, and I made
16 that argument in the state of Texas, to the
17 Texas judge, which he found persuasive.

18 Judge, you have overruled these
19 additives objections by the defendants for a
20 very good reason. The additives, as you
21 have already heard, Your Honor, give off
22 substances in the atmosphere which are
23 injurious to the health of people who
24 breathe sidestream smoke. So you have all
25 sorts of levels of relevance here, so I

3121

1 won't respond to any more of their comments
2 at this time.

3 THE COURT: Thank you, Mr. Motley.
4 Mr. Wagner, anything else?

5 MR. WAGNER: Just one or two brief
6 responses. There has not been a scintilla
7 of evidence in this case that additives
8 cause health injuries of any kind, much less
9 Mrs. Wiley's health injuries, and so it's
10 not relevant to anything in this case, and
11 it won't be relevant to anything in this
12 case. This is just a make weight argument
13 the plaintiffs are using in order to try to
14 get this in.

15 I don't know any law to back this up,
16 but, certainly, if a court orders a document
17 to be disclosed, and a party wishes to
18 address publicly that document because it's
19 going to be disclosed anyway, I don't think
20 that's a waiver.

21 Now, it may be that Mr. Motley got his
22 copy from wherever he says he got it and
23 some of these other things, but that doesn't
24 waive the privilege and the work product
25 nature of the document.

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1 But, again, even laying all of that to
2 one side, it's not an admission, it's not
3 created by a party, it's created by lawyers,
4 it's a think piece and a strategy piece, and
5 that's all it really is. And it can't be
6 anything else and standing up here and
7 trying to call it something else isn't going
8 to change the nature of the document.

9 It can't be anything except confusing
10 and misleading to the jury. There is no way
11 that anybody can explain that to the jury so
12 that they can draw these distinctions, Your
13 Honor, and it's prejudicial to allow it to
14 go to the jury for all those reasons. And
15 it has no relevancy, and even if it did, it
16 ought to be kept out because of its
17 prejudicial nature.

18 THE COURT: The Court is not
19 dealing with 8 Liggett documents. What I'm
20 dealing with is 30861, and the motion of the
21 defendants, frankly, if ever I have seen
22 work product, this is it. The motion is
23 well taken at this point. 30861 will not be
24 referred to during Mr. LeBow's testimony.

25 We'll take five minutes and bring the

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1 jury back.

2 (A brief recess was taken.)

3 MR. CASSELL: All rise.

4 (Jury present)

5 THE COURT: Be seated. The jury is
6 back in its entirety together with the
7 alternates.

8 Mr. Motley, call your next.

9 MR. MOTLEY: Mr. Bennett LeBow,
10 Your Honor.

11 THE COURT: Good morning, sir.

12 THE WITNESS: Good morning, Your
13 Honor.

14 THE COURT: Would you raise your
15 right hand.

16 THE WITNESS: Yes, sir.
17 PLAINTIFFS' WITNESS, BENNETT S. LEBOW, SWORN
18 THE COURT: Be seated, please.
19 Would you tell this jury your name, sir.
20 THE WITNESS: Bennett S. LeBow.
21 THE COURT: Would you spell your
22 last name for the record.
23 THE WITNESS: L-E capital B-O-W.
24 THE COURT: Thank you, sir.
25 Mr. Motley.

3124

1 DIRECT EXAMINATION
2 BY MR. MOTLEY:
3 Q Good morning, Mr. LeBow.
4 A Good morning.
5 Q We have met before but not recently. How
6 are you doing?
7 A Good. How are you?
8 Q You are -- I wrote some names up here. Your
9 name is Bennett LeBow and I wrote up Liggett
10 and I wrote up L&M. Used to be called
11 Liggett & Myers; is that correct?
12 A That's correct.
13 Q Would you tell the ladies and gentlemen what
14 Brooke is, Brooke Group.
15 A Brooke is a New York Stock Exchange public
16 company which owns through another
17 subsidiary 100 percent of Liggett.
18 Q And Liggett currently manufactures
19 cigarettes in the United States?
20 A That's correct.
21 Q Would you tell the ladies and gentlemen of
22 the jury what brand of cigarettes Liggett
23 manufactures.
24 A We manufacture L&M, Chesterfield, Lark, Eve
25 and a host of discount brands, non-name

3125

1 brands.
2 Q I believe you also do contract manufacture
3 for other companies?
4 A Yes. We manufacture cigarettes for other
5 companies who put their own brands -- their
6 own names on it.
7 Q So you put their packages on cigarettes you
8 manufacture for them; is their fair?
9 A They supply the package to us and we package
10 it for them. Right.
11 Q Where do you live, sir?
12 A I live in [DELETED].
13 Q What is your current position?
14 A I am chairman and chief executive officer of
15 Brooke Group, the parent company of Liggett.
16 Q And Brooke Group owns 100 percent of the
17 stock of Liggett?
18 A That's correct.
19 Q When did you first -- are you also a
20 shareholder in RJ Reynolds Nabisco?
21 A Through another subsidiary we own some stock
22 of RJR, yes.
23 Q And Brooke Group owns 100 percent of Liggett
24 and you're chairman of Brooke Group?
25 A That's correct.

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1 Q For a brief period of time you were chairman
2 of Liggett also?
3 A For a very brief period of time, yes.
4 Q When did you acquire the company? And if
5 you don't mind me calling it Liggett, since
6 I think folks on the jury are familiar with
7 Liggett & Myers cigarettes, L&M cigarettes,
8 Chesterfield and things like that, would you
9 mind telling the ladies and gentlemen of the
10 jury how you acquired Liggett and why?
11 A I'm primarily in the financial, what's
12 called the financial opportunity business,
13 and in October of 1986 the transaction known
14 as Liggett & Myers came to me as a financial
15 transaction. As a financial person, we did
16 a buyout of Liggett and purchased Liggett in
17 October of 1986.
18 Q And have you been the chairman of Liggett
19 which owned 100 percent of the stock --
20 chairman of Brooke which owns 100 percent of
21 the stock of Liggett continually since
22 October of 1986?
23 A Yes, I have.
24 Q Tell the ladies and gentlemen of the jury a
25 little bit about your educational

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1 background, Mr. LeBow.
2 A I have a Bachelor of Science in Electrical
3 Engineering from Drexel University in
4 Philadelphia. I spent a year at graduate
5 school in Princeton in the computer systems
6 design.
7 Q And after college what did you do?
8 A I was called into the Army. I was stationed
9 at the Pentagon as a first lieutenant during
10 the Vietnam War and eventually stayed on as
11 a civilian and became assistant to the
12 assistant vice chief of staff of the Army,
13 responsible for the computers throughout
14 the -- during the 1960s in the Pentagon.
15 Q So if there was a computer breakdown at the
16 Pentagon, you were the man responsible?
17 A You could yell at me back in the '60s.
18 After that I became independent, doing
19 independent financial transactions,
20 specializing at the time and still in what's
21 called distressed companies or troubled
22 companies, getting involved in companies who
23 are having financial difficulty, acquiring
24 them, turning them around, making them a
25 success over the years. And I've been doing

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1 that over the past, I guess 30 years now.
2 Q Just by way of background, Mr. LeBow, tell
3 the jury, you're a married man; is that
4 correct?
5 A I'm married, to the same woman, happy to
6 say, for the past 38 years. I have two
7 children and five grandchildren.
8 Q Now, you are -- your company, Liggett, is a
9 defendant in this case?
10 A That's correct.
11 Q And you are, being a businessman, you know

12 that we file complaints and make allegations
13 and then your company has a chance to file
14 what's known as an answer or response. Do
15 you understand that that's happened in this
16 case?

17 A Yes, I do.

18 Q So you understand your company is a
19 defendant in this case?

20 A 100 percent. We know we're a defendant.

21 Q And you understand that I served a subpoena
22 on your attorneys but you were not compelled
23 to be here because it was out of state?

24 A That is correct.

25 Q Were you going to testify in this case

3129

1 anyway?

2 A Yes, I was happy to come here.

3 Q Also, Mr. LeBow, I asked you to bring some
4 documents but your lawyer told me this
5 morning that you had already produced all
6 the documents I had asked for. Do you
7 understand that's correct?

8 A That's correct.

9 Q Now, Mr. LeBow, you are the majority
10 stockholder in Brooke Group?

11 A That's correct. I am.

12 Q And you control the policies and procedures
13 through others but you're the main man at
14 Brooke Group?

15 A That's correct.

16 Q And Brooke Group sets the policies and
17 procedures of Liggett?

18 A To a major degree, except for the day-to-day
19 operations, that's correct.

20 Q Now, you told us that when you purchased the
21 stock of Liggett in 1986, this was a
22 business proposition; is that correct?

23 A It was primarily just a financial
24 proposition at the time, yes.

25 Q Did you have any burning desire to get in

3130

1 the cigarette business in 1986?

2 A No. I looked upon it as strictly a
3 financial proposition.

4 Q In 1986 were you a smoker?

5 A No.

6 Q Had you smoked in your past?

7 A Yes. I stopped, I believe, in 1969. But I
8 was a heavy smoker up until 1969.

9 Q Did you, consequently, to your knowledge,
10 have any health problems from smoking
11 cigarettes?

12 MR. OHLEMEYER: Objection, Your
13 Honor, relevance.

14 THE COURT: You can answer that.

15 A No. I don't smoke so...

16 Q Now, sir, are you here today on behalf of
17 and speaking for the Liggett Corporation?

18 A Yes, I am.

19 Q And you're essentially here --

20 MR. MOTLEY: Your Honor, I don't
21 know what the procedure is here in Indiana,
22 but I'm calling Mr. LeBow as an adverse

23 witness under your rules and he is a
24 controlling shareholder of a defendant. I
25 don't know if I'm supposed to say that.

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1 THE COURT: Right.

2 Q Okay. Mr. LeBow, do you consider yourself a
3 strong-willed person?

4 A Absolutely.

5 Q Did you have any difficulty quitting smoking
6 when you did in 1969?

7 MR. OHLEMEYER: Objection, Your
8 Honor, relevance.

9 MR. WAGNER: Relevance.

10 THE COURT: I'm going to sustain
11 that objection, Counselor.

12 Q Now, Mr. LeBow, are you familiar with what's
13 known as market share?

14 A Yes.

15 Q Would you define what market share is for
16 the ladies and gentlemen of the jury,
17 please.

18 A It's the percentage of the market, a
19 percentage of market a company may or may
20 not have.

21 Q I take it since you have a business interest
22 in Liggett, you're familiar with their
23 market share.

24 A Yes, I am.

25 Q Would you tell us in 1986 approximately what

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1 market share of the United States cigarette,
2 domestic cigarette market Liggett enjoyed.

3 A In 1986 I don't recall exactly, but it was
4 somewhere in the 3 percent, maybe 4 percent
5 range. In that range.

6 Q And do you know who the industry leader was
7 in 1986?

8 A I'm sure it was Philip Morris. I'm pretty
9 sure it was.

10 Q In approximately 1990, 1991, do you know
11 what the market share was -- and I'm not
12 holding to you exact numbers. Just
13 approximate it for me.

14 A Under 3 percent, I would guess.

15 Q So it was declining?

16 A It was declining, that --

17 Q And currently what market share does Liggett
18 have?

19 A Last year we had about 1.4, 1.5 percent.

20 Q Now, are you familiar with what's called
21 Maxwell reports?

22 A Yes, I am.

23 MR. MOTLEY: May I approach the
24 witness, Your Honor?

25 THE COURT: Yes.

3133

1 Q While I'm doing this, would you tell the
2 ladies and gentlemen of the jury what a
3 Maxwell report is.

4 A John Maxwell is an analyst on Wall Street
5 who puts together the share of market that
6 each company has and publishes a report, I
7 believe quarterly, telling everybody what

8 the share of the market for every company
9 and brands, every brand of cigarette, you
10 know, that type of thing.
11 Q And is it relied upon by people in the
12 industry to demonstrate what your market
13 share is, at least in part?
14 A Very much so.
15 Q I'm going to hand you 28201 and 9085 and ask
16 you if you can identify those for me,
17 please, sir.
18 A The first one is an analysis by Mr. Maxwell.
19 I guess of his numbers, appears to be. And
20 the second one is an actual Maxwell report
21 for March 4, 1996, for the entire year of
22 1995, it appears to be.
23 Q 9085 is the March 4, '96?
24 A That's correct.
25 Q And 28201 is the 1977 USA Cigarette Sales by
3134

1 Brand by Type by Company?

2 A Correct.

3 MR. MOTLEY: Your Honor, we would
4 move those into evidence at this time.

5 THE COURT: Any objection, Mr.
6 Ohlemeyer?

7 MR. OHLEMEYER: Your Honor, I have
8 no objection under 803-17 to the
9 compilations, the data compilations. I do
10 object to the analysis as being hearsay, the
11 narrative paragraphs.

12 MR. MOTLEY: We can change these,
13 Your Honor, to get the narrative out. All I
14 was interested in was the market data.

15 THE COURT: You're going to take
16 out the narrative?

17 MR. MOTLEY: Yes.

18 THE COURT: All right. With that
19 modification, 28201 will be admitted. 9085
20 will be admitted.

21 (Plaintiffs' Exhibit(s) 28201, 9085
22 received in evidence.)

23 MR. MOTLEY: Because I have to take
24 things out, I won't give the jury copies
25 right now. I'll just show what I want on
3135

1 the Elmo.

2 Q Just turn to the data, please. Mr. LeBow,
3 you have a monitor over here, and can you
4 see that?

5 A Barely. Okay, I can see it.

6 Q You can see it now?

7 A Yes.

8 Q Which exhibit are we having on the screen
9 there? This is 9085, which is the 1996.

10 Can you see that, Mr. LeBow?

11 A Can I read it out of here?

12 Q Absolutely. Yes.

13 A What page is this on? I have it, okay. I
14 have it.

15 Q Okay. Now, would you tell us whether that
16 is consistent with your understanding of
17 what the market share might be for Liggett
18 in 1995?

19 A This is the market share for all brands.
20 Q I was talking about what's highlighted here.
21 A I'm sorry. I'm sorry. Okay.
22 Q Liggett's market share as reported is
23 2.2 percent?
24 A That's correct, for '95, that's correct.
25 Q And would you turn the page that has all the

3136

1 different -- page 2 of the next exhibit,
2 1977. Page 2 of the next exhibit,
3 Mr. LeBow.
4 A Yes, I have it.
5 Q And do you see here it shows 3.6 in 1977?
6 A I'm sorry. I don't have it. Page 2 of the
7 next exhibit. I'm sorry. Yes. 3.6 for
8 1977.
9 Q It shows Reynolds at 32.5, Philip Morris at
10 28 -- is that 26.3, Brown & Williamson at
11 15.7, and American Brand at 13.1, and
12 Lorillard at 18.8.
13 A Correct.
14 Q And I believe you testified that in the
15 early 1990s that Philip Morris would have
16 been number one?
17 A That's correct.
18 Q At some point in time Philip Morris overtook
19 RJ Reynolds?
20 A That's correct.
21 Q From your personal knowledge, do you know
22 what the most popular cigarette brand in the
23 mid to late '80s and early '90s is, that is,
24 like you sell Chesterfield and L&M, what was
25 the leading seller in the United States?

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1 A Marlboro cigarettes, to the best of my
2 knowledge.
3 Q Mr. LeBow, have you undertaken an
4 investigation of your company's -- I don't
5 mean a thorough, every piece of paper that's
6 ever been generated, but have you taken an
7 interest since 1995, 1996 in the position
8 your company has taken in cigarette
9 litigation in the past?
10 A Yes, I have.
11 Q Can you tell me that prior to 1997 --
12 actually prior to 1995, did Liggett, your
13 company, deny that cigarettes caused disease
14 in humans, including lung cancer?
15 A I believe my company followed the so-called
16 industry line and did that, yes.
17 MR. OHLEMEYER: Objection, Your
18 Honor, move to strike.
19 MR. MOTLEY: If he has personal
20 knowledge, he can say that, Your Honor.
21 THE COURT: Overruled. The motion
22 to strike is denied.
23 Go ahead, Mr. Motley.
24 Q Exactly what was this party line as you
25 understood it?

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1 MR. OHLEMEYER: Objection, Your
2 Honor, argumentative.
3 MR. WAGNER: And, yes, there is no

4 foundation that this witness is able to
5 comment upon the some.
6 THE COURT: Sustained as to
7 foundation.
8 Q Sir, you used the word "party line." Have
9 you come to learn, and then I'll ask from
10 you what sources, whether or not the
11 industry, as a group, had a, quote, party
12 line with respect to whether or not
13 cigarettes caused lung cancer in human
14 beings?
15 A Yes.
16 Q And how did you learn that, sir?
17 A From new attorneys I hired in 1996 who
18 finally went after many, many years
19 evaluating the documents, which I never saw
20 prior to this time.
21 Q How did you know that Liggett was following
22 a party line prior to 1995, 1996?
23 A Well, prior to that period of time, I was
24 told by all the attorneys we had in the
25 company, these are outside attorneys who
3139
1 have been there for 40 years and internal
2 attorneys --
3 MR. WAGNER: Objection to hearsay.
4 MR. MOTLEY: Your Honor, it's not
5 hearsay what his own attorneys told him.
6 THE COURT: Overruled.
7 A We had these attorneys outside and inside
8 the company for 40 years who have been
9 telling everyone in the company, including
10 myself over the ten years or eight, nine
11 years that I owned the company, that, you
12 know, don't worry about any of this
13 litigation, there is no problems, the
14 tobacco companies never paid a penny, you
15 know, in any litigation, we're going to win
16 every lawsuit, smoking has never been
17 caused -- been proven to cause any health
18 problems. There is no addiction problems,
19 et cetera, et cetera. And that that was the
20 so-called party line. I was told that many
21 times by my attorneys.
22 Q As a result of that, did you actually give
23 sworn testimony in 1993 in which you uttered
24 the party line?
25 A I was advised by my attorneys right before
3140
1 that deposition, 1993, that this is all
2 that's known, that there is no link between
3 smoking and health problems, that cigarettes
4 is not addictive, et cetera, et cetera.
5 And, you know, I just kind of said what they
6 told me to say in that case, because I
7 didn't have any other information to go on
8 at that time.
9 Q Did you rely on what your attorneys told you
10 in that regard?
11 A Yes, I did. At that point I did.
12 Q Did there come a point in time where Philip
13 Morris paid your lawyers?
14 A In 1995, early 1995, a couple strange things

15 happened. We have this same group of
16 lawyers who are outside, working outside for
17 us for 30, 40 years, and they wanted to
18 switch law firms, go to another law firm.
19 Q What was the name of the law firm, sir, for
20 the record?
21 A The law firm they wanted to go --
22 Q No, what was the name of the law firm they
23 were with?
24 A Mudge Rose. It was a law firm which in New
25 York for other reasons was dissolving, and

3141

1 they wanted to go to another law firm, a big
2 New York/Los Angeles firm called Latham
3 Watkins.

4 I said to them, since your law firm,
5 the law firm you've been using for many
6 years is a group of five or six attorneys
7 have been working for Liggett for 30, 40
8 years, I said, as long as their firm is
9 dissolving, why don't you go to a firm who I
10 know are experts in product liabilities. I
11 want you to go work with these guys.

12 Q Go ahead.

13 A These guys being the Katowitz firm in New
14 York. They called me back the next day,
15 said, well, if I let them go to Latham
16 Watkins, Philip Morris will pay all my legal
17 fees.

18 Q Now, how long have you been a businessman?

19 A 20, 30 years.

20 Q And you've owned different businesses;
21 correct?

22 A Correct.

23 Q In your entire career as a businessman, have
24 you ever had another company -- let me
25 rephrase that.

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1 Philip Morris was a competitor. Still
2 is?

3 A That's correct.

4 Q In other words, you compete in the
5 marketplace.

6 A That's correct.

7 Q And have you ever had a company where a
8 competitor offered to pay your lawyers'
9 legal fees to defend your company in a
10 lawsuit?

11 A Never. Never happened. I mean, completely
12 took me by surprise.

13 Q What is the magnitude of what this offer
14 was? Are you talking about \$10,000 a year
15 or what?

16 A At the time we were spending 8 to \$10
17 million a year.

18 Q And Philip Morris offered. Did it, in fact,
19 pay your legal fees for a while?

20 A Yes, they did. I accepted that offer just
21 to see what happened. It shocked me. I
22 couldn't believe the lawyers would allow
23 themselves to be paid by a competitive firm.
24 So I let them go to this Latham Watkins firm
25 for the time being and see what happens.

1 And Philip Morris started paying our legal
2 fees.

3 MR. MOTLEY: Your Honor, I would
4 like -- I want to return to the issue we
5 were talking about before we talked about
6 this attorney fee business.

7 Q By the way, what were the names of the
8 lawyers that worked for Mudge Rose who ended
9 up going to Latham & Watkins? Do you
10 remember the names?

11 A I remember the top guy's name is Kearney,
12 Mr. Kearney.

13 Q How do you spell that?

14 A I believe it's C-A-R-N-Y. I'm not totally
15 sure. I only met him a couple times, two or
16 three times.

17 Q Could it be K-E-A-R-N-E-Y?

18 A Yes. It's K-E-A-R. I don't know exactly
19 the spelling. The others I didn't know very
20 well.

21 MR. MOTLEY: The jury, Your Honor,
22 has heard Exhibit 1409, but I would like to
23 show Mr. LeBow that exhibit that's in
24 evidence.

25 THE COURT: All right.

1 Q We don't have multiple copies this morning
2 of some of these.

3 Mr. LeBow, I would ask you to assume
4 that this document was admitted by the Court
5 last week.

6 THE COURT: It's marked.

7 MR. MOTLEY: 1409?

8 THE COURT: Let's make sure this is
9 the correct document.

10 MR. MOTLEY: It's got different
11 numbers but 1409 is the correct number.

12 Take that off the screen, please.

13 THE COURT: It is in evidence,
14 Counselor. You're all right.

15 MR. MOTLEY: Okay. I'm going to
16 give you a copy, Mr. Cassell.

17 Q Okay. Assume that this is a memo from a
18 vice president of the Tobacco Institute.
19 You do know what the Tobacco Institute is,
20 don't you?

21 A Yes, I've heard of it.

22 Q Liggett at one time was a member of that;
23 correct?

24 A That's correct.

25 Q From the vice president, Mr. Panzer, to the

1 president, Mr. Kornegay dated May 1, 1972,
2 and I'd ask you to look at the second
3 paragraph.

4 MR. WAGNER: Your Honor, I'm going
5 to object to the witness commenting upon a
6 extraneous document that was created by
7 somebody else and questions directed to this
8 witness based upon a document that is not
9 his document and asking him questions. The
10 document speaks for itself, Your Honor. It

11 doesn't need interpretation or commentary by
12 this witness.

13 THE COURT: I haven't heard that
14 he's going to interpret it yet. The
15 objection is overruled.

16 Go ahead.

17 Q Back in 1972 he said this wasn't this
18 document. In fact, Liggett was a member of
19 the Tobacco Institute, isn't it?

20 A That's correct.

21 Q So this is your document if it's a Tobacco
22 Institute document.

23 A That's correct.

24 Q For nearly 20 years this industry has
25 employed a single strategy to defend itself

3146

1 on three major fronts: Litigation, politics
2 and public opinion. While the strategy was
3 brilliantly conceived and executed over the
4 years helping us win important battles, it
5 is only fair to say that it is not, nor was
6 it intended to be a vehicle for victory. On
7 the contrary, it has always been a holding
8 strategy consisting of creating doubt about
9 the health charge without actually denying
10 it.

11 The reason I was showing you this,
12 Mr. LeBow, is I'm asking you in 1993, when
13 you had your conversations with Mr. Kearney
14 and the other lawyers, was that your
15 understanding of what the party line was, to
16 create doubt about the health charge without
17 actually denying it?

18 MR. OHLEMEYER: Objection, Your
19 Honor.

20 MR. WAGNER: Objection. Same
21 grounds as before, Your Honor, it isn't
22 necessary for the attorney to go through an
23 extraneous document in order to ask him a
24 simple question, Your Honor.

25 THE COURT: Objection is overruled.
3147

1 You may restate your question, Counsel.

2 MR. WAGNER: May we have a
3 continuing objection, Your Honor, to this
4 line of questioning?

5 THE COURT: I'll show a continuing
6 objection to the witness referring to 1409.

7 Go ahead, Mr. Motley.

8 Q In fact, 21 years later, when you were
9 talking with Mr. Kearney, your lawyer, did
10 he tell you that was a party line, creating
11 doubt about the health charge without
12 actually denying it?

13 MR. OHLEMEYER: Objection, Your
14 Honor, hearsay.

15 MR. MOTLEY: It's not hearsay when
16 his attorneys --

17 THE COURT: Overruled. You may
18 answer.

19 Q Didn't he tell you that?

20 A Would you repeat the question again.

21 Q Okay. We're going to get this one out

22 eventually. 21 years later, when you had a
23 conversation with Mr. Kearney, did he
24 explain to you the party line in words to
25 the effect of the party line was to create

3148

1 doubt about the health charge without
2 actually denying it?

3 MR. OHLEMEYER: Same objection,
4 Your Honor.

5 A Pretty much he said those words.

6 Q On page 2, the strategic impasse. Did
7 Mr. Kearney, your attorney, tell you that
8 the industry party line was words to the
9 effect that the case is not proved?

10 A Absolutely.

11 Q 21 years later; correct?

12 A Yes.

13 Q Did Mr. Kearney tell you that it was the
14 industry position that the public,
15 particularly heavy smokers, must perceive,
16 understand, and believe in evidence to
17 sustain their opinion that smoking may not
18 be the causal factor?

19 MR. OHLEMEYER: Same objection,
20 Your Honor.

21 THE COURT: Noted and overruled.

22 You may answer.

23 A Not in so many words, but that was the clear
24 intent.

25 Q Mr. LeBow, let's go back to 1993 for a

3149

1 second. You gave a deposition, because I
2 happen to have a copy of it. Do you
3 remember -- first, let me ask you this
4 question: And I'm only talking now about
5 cigarette companies, okay?

6 In cigarette litigation, had you ever
7 given a sworn statement, a deposition, prior
8 to 1993?

9 A No. Not that I recall.

10 Q Your company was a defendant, though, when
11 you took it over in 1986, Liggett was a
12 defendant in a case called -- and I'll
13 apologize to the family if I don't pronounce
14 this correctly. Cippollo or Cippollone?

15 A Cippollone, that's correct.

16 Q And that was in New Jersey; correct?

17 A Yes.

18 Q But for seven years you never were called
19 upon to give testimony; is that correct?

20 A That's correct.

21 Q In 1993 you gave testimony in a case called
22 Broin, B-R-O-I-N. Do you recall the name of
23 that case?

24 A Yes.

25 Q Just generally without getting into any

3150

1 details, Mr. LeBow, would you share with the
2 jury what you understood, what was your
3 understanding the nature of that case was.

4 MR. OHLEMEYER: Objection, Your
5 Honor.

6 THE COURT: Sustained to that.

7 MR. MOTLEY: Your Honor, I think --
8 THE COURT: General understanding
9 you can tell us.
10 MR. OHLEMEYER: May we approach,
11 Your Honor?
12 (Bench discussion.)
13 THE COURT: The last objection is
14 overruled. Restate your question, please.
15 Q Mr. LeBow, listen carefully and just answer
16 this yes or no, okay? The Broin case was a
17 secondhand smoking case, was it not?
18 A Yes.
19 Q And you gave testimony in this case. Do you
20 recall that?
21 A Yes.
22 Q Prior to your giving testimony in that
23 case -- let me rephrase it.
24 The lawyers, Mr. Kearney, his law firm,
25 were representing Liggett at the time?

3151

1 A That's correct.
2 Q And prior to your giving the testimony in
3 the Broin case, did Mr. Kearney show you any
4 internal Liggett documents that would deal
5 with issues such as addiction, lung cancer
6 and things like that?
7 A Absolutely not.
8 Q He did not.
9 A No, did he not.
10 Q Who was the general counsel -- you've used
11 the word out-counsel and in-counsel. Who
12 was the -- Mr. Kearney's law firm was the
13 outside counsel, like us lawyers don't work
14 for the corporation.
15 A Correct.
16 Q Then you had a lawyer inside the company who
17 was an officer of the company; correct?
18 A That is correct.
19 Q What was his name?
20 A Josiah Murray.
21 Q Josiah Murray. And was he with the company
22 in 1993?
23 A Yes.
24 Q Did he share with you any internal Liggett
25 documents on addiction, secondhand smoke,

3152

1 and lung cancer?
2 A No.
3 Q Now, at your deposition in 1993, did you
4 follow the party line?
5 MR. WAGNER: Objection. Object to
6 what this witness may or may not have said
7 in a deposition. It's improper to ask a
8 witness questions about what he said in
9 another venue in another deposition and a
10 different case.
11 MR. MOTLEY: This is a leading
12 question, Your Honor, it's an adverse
13 witness. I can impeach him or ask him
14 questions.
15 THE COURT: The objection is
16 overruled.
17 Q Did you not testify, Mr. LeBow, in that case

18 that cigarette smoking is not addictive?
19 A Yes. I told -- I said what I was advised by
20 my attorneys and at the time I wasn't quite
21 sure. I remember my own personal experience
22 of having stopped.
23 Q But the truth of the matter is you testified
24 in that case smoking was not addictive.
25 A That's correct.

3153

1 Q Now, you understand from your own knowledge
2 of your own corporate documents, the
3 statement you made in 1993, that smoking was
4 not addictive, is not true based on what you
5 know today.

6 MR. OHLEMEYER: Objection, Your
7 Honor, argumentative.

8 MR. WAGNER: And lack of
9 foundation. This witness hasn't been
10 demonstrated to have any scientific
11 knowledge about what is or is not addictive.

12 MR. MOTLEY: He's the policy maker
13 for the corporation, Your Honor, he can bind
14 the corporation.

15 THE COURT: Objection is overruled.
16 Repeat your question.

17 Q You testified in 1993 that cigarette smoking
18 was not addictive because you hadn't seen
19 any documents, and now you have seen
20 documents and you have a different view of
21 whether smoking is addictive, both you and
22 your company, don't you?

23 A That's correct.

24 Q At the point in time --

25 MR. MOTLEY: Your Honor, I move at
3154

1 this time to admit the package of Liggett
2 cigarettes. If there is not any objection,
3 I need to get the pack back because I only
4 have ten.

5 THE COURT: It will be marked
6 Plaintiffs' 29.

7 Any objection, Mr. Ohlemeyer?

8 MR. OHLEMEYER: To relevance, Your
9 Honor.

10 THE COURT: Overruled. 29 will be
11 admitted.

12 (Plaintiffs' Exhibit(s) 29 received in
13 evidence.)

14 Q Will you identify that for me, Mr. LeBow,
15 and then I'm going to take it back.

16 A It's a package of our cigarettes, L&M
17 cigarettes.

18 Q Now, Mr. LeBow, prior to 1997, your
19 cigarette pack carried the Surgeon General's
20 warning label and no other warning, did it
21 not?

22 A That's correct.

23 Q Now, would you tell the ladies and gentlemen
24 of the jury --

25 Can you show it on the screen now.

3155

1 If you can look on your screen since I
2 didn't have the carton.

3 A That's fine. I see it.
4 Q Can you see this?
5 A Yes.
6 Q Can you tell the ladies and gentlemen of the
7 jury, if they can see this part of the
8 package, what your company did at your
9 direction to warn the American public about
10 addiction in 1997?
11 A We put it on all of our packs, the ones we
12 manufacture for sale by ourselves, the
13 warning label warning: Smoking is
14 addictive.
15 Q To your personal knowledge, does any other
16 manufacturer in the United States of America
17 put such a warning label on their
18 cigarettes?
19 A No, they do not.
20 Q They do not. And why did you order your
21 company to place that warning label on your
22 cigarettes in 1997?

23 MR. WAGNER: Objection, Your Honor,
24 as to why he did anything.

25 THE COURT: Overruled. You can
3156

1 answer that, sir.
2 A We did it because we believe it. We believe
3 the public should be warned and we were
4 happy to do it.

5 Q Would you turn to the Surgeon General's
6 warning label, please, on that same pack.
7 Display it.

8 Now, you see on the side of this,
9 ladies and gentlemen of the jury will see
10 the Surgeon General's warning: Cigarette
11 smoke contains carbon monoxide. That says
12 that's the Surgeon General's warning. It
13 doesn't say it's Liggett's, correct?

14 A That's correct. That's mandated by law by
15 the Surgeon General.

16 Q You added additional warning and you didn't
17 say the Surgeon General made you do it;
18 correct?

19 A No one made us do it. It was totally
20 voluntary.

21 Q Mr. LeBow, would you identify this carton
22 from which I got those cigarettes, please.

23 A Yes, this is the carton we now issue which
24 have the ingredients listed on the side.

25 MR. MOTLEY: We move the carton in
3157

1 as Exhibit 30.

2 MR. OHLEMEYER: Same objection,
3 Your Honor.

4 THE COURT: Objection noted and
5 overruled. 30 will be admitted.

6 (Plaintiffs' Exhibit(s) 30 received in
7 evidence.)

8 MR. MOTLEY: Your Honor, may I let
9 the jury pass this amongst themselves. It
10 will take a minute or two.

11 THE COURT: That's all right.

12 MR. MOTLEY: If I would have bought
13 ten cartons, your market share would go up.

14 I think, ladies and gentlemen, the part
15 we're focusing on is where he lists the
16 ingredients.

17 Would you mark this for ID, please.

18 Q Mr. LeBow, I'm going to show you Exhibit 30
19 and Exhibit 31.

20 To your personal knowledge, sir, does
21 any other United States manufacturer tell
22 the consumer what the ingredients of
23 cigarettes are other than Liggett?

24 MR. WAGNER: Your Honor, we have an
25 objection for the record, just a pre-emption

3158

1 as to this line of testimony. I know Your
2 Honor has ruled on that, but for purposes of
3 the record we want to have a continuing line
4 of objections to this line of questioning on
5 the basis of the pre-emption.

6 THE COURT: I will note that
7 objection on the pre-emption argument. The
8 objection is overruled.

9 Are you offering 31?

10 MR. MOTLEY: Yes, Your Honor, it's
11 a carton of American Camel cigarettes.

12 THE COURT: Any objection,
13 Mr. Ohlemeyer?

14 MR. MOTLEY: When I said American
15 Camels, I meant made in America by RJ
16 Reynolds.

17 MR. OHLEMEYER: Same objection,
18 Your Honor, foundation and relevance.

19 THE COURT: Objection will be noted
20 and overruled. 31 will be admitted.

21 Go ahead, Counselor.

22 (Plaintiffs' Exhibit(s) 31 received in
23 evidence.)

24 MR. MOTLEY: Would you demonstrate
25 30 now for the jury.

3159

1 Q Mr. LeBow, are you a scientist?

2 A No, I'm not.

3 Q Do you know what any of these ingredients
4 will do when it's heated to 1,000 degrees
5 centigrade?

6 A No, I do not.

7 Q You don't know what it will do. You don't
8 know what the chocolate favor, licorice or
9 any of that does when it's --

10 MR. WAGNER: Asked and answered.

11 MR. MOTLEY: I was giving
12 specifics, Your Honor.

13 THE COURT: Overruled. Go ahead.

14 Q You don't know what happens to licorice when
15 it's converted to 1,000 degrees Fahrenheit
16 and it's emitted in smoke?

17 A No, I do not know exactly.

18 Q But you are giving the consumers knowledge
19 of what's in your products?

20 A We're telling the consumers and the
21 government, if they wish to test these
22 ingredients, that here it is, test it and
23 let's tell consumers exactly what the
24 harmful products are so they will know.

25 MR. MOTLEY: Will you show 31 now,
3160
1 please. It's a carton of RJ Reynolds Camels
2 manufactured in the United States. Will you
3 turn it each way after you've focussed on it
4 about 15 seconds. Focus in on that left
5 side, please, so they can see what that
6 says.

7 It says it's a product quality,
8 questions, call toll free.

9 Now both ends, please. No. Upside
10 down. Can you do that? Okay. The other
11 end.

12 Q Mr. LeBow, will you agree there is no such
13 additives listed on that?

14 A Absolutely not.

15 Q Mr. LeBow, I want you to assume that this is
16 a carton of Camels from Canada.

17 A A pack.

18 Q A pack of Camels sold in Canada. Will you
19 read that warning label for the ladies and
20 gentlemen of the jury.

21 MR. WAGNER: Your Honor, this is
22 really --

23 THE COURT: Is this marked?

24 MR. MOTLEY: I'm sorry, Your Honor,
25 I forgot to mark it. We move No. 32 in
3161

1 evidence.

2 MR. WAGNER: Your Honor, we object
3 to this. It has no relevancy to anything in
4 this case. Cigarettes from Canada, you're
5 talking about laws from a different country.
6 It doesn't have any relevancy here.

7 MR. MOTLEY: It's not pre-emptive,
8 Your Honor. It shows feasibility of what
9 they could have done in the United States.

10 THE COURT: For that reason I will
11 allow it. 32 will be admitted.

12 (Plaintiffs' Exhibit(s) 32 received in
13 evidence.)

14 MR. WAGNER: May we add a
15 pre-emptive objection to this also, Your
16 Honor?

17 THE COURT: I'll show that also,
18 Counselor, thank you.

19 Q Can you read that once they focus in on it?

20 A It's in French, so I can't read it too well.
21 Even though my last name is LeBow, I don't
22 speak French.

23 Q Would you turn it over, please. This
24 Canadian pack, do you see it's got the
25 Canadian brand on the top of it, sir?

3162

1 A Yes.

2 Q It says "tobacco smoke causes fatal lung
3 disease in nonsmokers," doesn't it?

4 A Yes, it does.

5 Q Now, Mr. LeBow, there is no reason why
6 Liggett couldn't put that warning on their
7 cigarettes in America, is there?

8 A No, no reason, if we could fit it, if there
9 was room on the pack, yes.

10 Q Just like you put smoking is addictive, you
11 could put that same warning on your L&M
12 cigarette packs in America, couldn't you?
13 A Yes, we could.
14 Q Mr. LeBow, do you know any scientific reason
15 why Liggett would disagree with the Senate
16 of the United States that cigarette smoking,
17 secondhand smoke, environmental tobacco
18 smoke, causes lung cancer in human beings?
19 MR. OHLEMEYER: Objection, Your
20 Honor, lack of foundation from this witness.
21 MR. MOTLEY: He's speaking for the
22 company, Your Honor.
23 MR. WAGNER: There is no foundation
24 laid that he has had any scientific
25 background of any kind to make that kind of
3163

1 opinion, Your Honor.
2 THE COURT: Overruled. You may
3 answer.
4 Q Do you have any reason to disbelieve the
5 Surgeon General that cigarette smoking,
6 environmental tobacco smoke, causes fatal
7 lung disease in nonsmokers?
8 A No. I have no reason to disbelieve that.
9 Q Now, Mr. LeBow, I want to move on to another
10 subject matter at this time. You testified
11 earlier that you relied on Mr. Kearney and
12 Mr. Murray, I believe Mr. Josiah Murray, to
13 advise you about what information might be
14 available to you as the leader of your
15 corporation. Is that fair?
16 A Well, for the first eight years of owning
17 the company, that's all I relied upon were
18 the attorneys telling me there was no
19 problem. I didn't focus on the issues. I
20 didn't study any of the documents. They had
21 all the documents, they were telling me
22 there was no problem, don't worry about it
23 and they were advising me, yes.
24 Q Was there a time when your grandson caused
25 you to second think, perhaps, what you were
3164

1 doing?
2 MR. WAGNER: We'll object to this
3 line of questioning, it has no relevancy
4 here.
5 MR. MOTLEY: State of mind, Your
6 Honor. It may go to why he --
7 THE COURT: I'll sustain that.
8 A About a year --
9 Q No, he said you can't talk about it.
10 A I'm sorry.
11 Q That's okay.
12 MR. MOTLEY: Your Honor, this is
13 Plaintiffs' Exhibit No. 10813 that's already
14 in evidence.
15 THE COURT: All right.
16 MR. MOTLEY: And I do have copies
17 for Your Honor and for the jury,
18 Mr. Cassell.
19 Q Mr. LeBow, I've pretagged a copy of this
20 exhibit to help you find things a little

21 more easily.
22 A Okay.
23 MR. MOTLEY: Your Honor, for the
24 record, this is Exhibit 10813. Your Honor
25 admitted it into evidence. Its date is
3165
1 October 1964. At the top it says "Strictly
2 Confidential." And it says "Report on
3 Policy Aspects of the Smoking and Health
4 Situation in the United States of America."
5 Back on page -- if you folks look on
6 the side, it has Bates numbers, got about
7 nine or ten digits in it. If you look at
8 the last three numbers, 132, all the way
9 towards the back.
10 Q Do you see, Mr. LeBow, if you look in the
11 Bates numbers, all the way about two or
12 three from the back you'll see Bates No.
13 132. It's 1003119132?
14 A Yes, I see it.
15 Q Do you see there's a list of all the people
16 that these people had discussions with back
17 34 years ago?
18 A Yes, I see the list.
19 Q And do you see Liggett & Myers listed there,
20 sir?
21 A Yes, I do.
22 Q Do you recognize the name of Dr. Bates and
23 Dr. Darcus, whose names that you've seen in
24 documents?
25 A I've seen them just briefly. I don't know
3166
1 these people, though.
2 Q I want to ask you some questions, sir.
3 Mr. LeBow, did you come to understand,
4 sir, that the lawyers were running the
5 legislation and the litigation and the
6 public relations like I showed you on that
7 1972 document?
8 MR. OHLEMEYER: Objection, Your
9 Honor. Argumentative.
10 Q Your lawyers --
11 THE COURT: Do you want to fix a
12 time, Counselor?
13 Q Yes. When you started getting ready for
14 your deposition in 1993, from 1993 to 1996,
15 did you come to appreciate, negotiate, and
16 learn and sense yourself that the lawyers
17 were running your cigarette company with
18 regard to decisions about how to handle
19 litigation, about legislation, about
20 politics and public relations?
21 MR. WAGNER: Argumentative, leading
22 and suggestive. Calls for this witness to
23 opine about something about which there is
24 no foundation, Your Honor, based on hearsay.
25 MR. MOTLEY: He's an adverse
3167
1 witness, Your Honor.
2 THE COURT: Overruled. Overruled.
3 A As I said before, Mr. Motley, in 1995 I was
4 informed that Philip Morris wanted to pay
5 all my legal fees. In addition, and prior

6 to this, I was told all the time by all the
7 lawyers involved, Mr. Josea Murray and all
8 the outside attorneys, Mr. Kearney and so
9 forth, that there was no problem with all
10 this smoking litigation. We win everything
11 and nothing has ever been proven. But in
12 1995, Philip Morris all of a sudden wanted
13 to pay my legal fees.

14 MR. WAGNER: It's all repetitious.

15 A Let me finish.

16 THE COURT: The objection is
17 overruled. The question was did you come to
18 learn in 1995 that the lawyers, what their
19 role, what the lawyers' role was. Generally
20 that was the question.

21 A The answer to that is yes.

22 Q You've given us the reasons?

23 A Not completely.

24 Q You've already told us about Philip Morris,
25 Mr. LeBow. Did you want to add something to

3168

1 that?

2 A Yes, I do.

3 Q Go ahead, sir.

4 A Okay. In addition, at that time I was
5 involved in a proxy fight with other
6 shareholders against -- involving RJR where
7 we were telling -- the shareholders wanted
8 RJR to split up the company between Nabisco
9 and tobacco.

10 Q RJR being a food company?

11 A Yeah, Nabisco being a food company and the
12 tobacco company being, obviously, a tobacco
13 company. RJR came out publicly at that
14 time -- again, this is late '95, and said to
15 me, Well, we can't do that.

16 MR. WAGNER: Objection. I don't
17 want to interrupt the witness' testimony,
18 but this has no relevancy to this case about
19 a proxy fight, something to do with two
20 corporations and this witness' participation
21 in that.

22 THE COURT: Well, corporations that
23 are involved here.

24 MR. MOTLEY: Yes, RJR and Nabisco
25 is a defendant.

3169

1 THE COURT: Objection is overruled.

2 Go ahead, Mr. Witness.

3 A So we were involved in this attempt by other
4 shareholders, myself and other shareholders
5 to get RJR to split up the company to two
6 divisions.

7 RJR came out publicly and said they
8 can't do that because of all the litigation.
9 I said, "What ligation? There is no
10 litigation. You've told me for 40 years
11 there is no problem."

12 So now I've got Philip Morris paying my
13 legal fees; I've got RJR saying there is a
14 problem with all the litigation, and very
15 honestly, I then smelled a rat. Something
16 didn't make sense.

17 Q Would you turn, please, to page 3 of the
18 document that I gave you, which is Bates No.
19 101. Under legal matters.

20 The second full paragraph, ladies and
21 gentlemen.

22 MR. WAGNER: Here once again,
23 Judge, we have an objection to the witness
24 commenting upon matters that are contained
25 in this document, being asked questions

3170

1 about it. If I could have a continuing
2 objection to that.

3 MR. MOTLEY: I haven't even asked
4 him a question.

5 THE COURT: I understand that but I
6 will show a continuing objection to him
7 referring to the document but the objection
8 is overruled. Go ahead, Mr. Motley.

9 Q In the United States -- do you follow me,
10 Mr. LeBow?

11 A Yes, I do.

12 Q -- by far the most important factor
13 conditioning action by the manufacturers is
14 the lawsuit situation. Do you see that,
15 sir?

16 A Yes, I do.

17 Q Then skip down a sentence and it says, The
18 leadership in the United States smoking and
19 health situation therefore lives with the
20 powerful policy committee of senior lawyers
21 advising the industry.

22 Did you see that?

23 A Yes, I do.

24 Q And their policy was understandably, in
25 effect, don't take any chances. It is a

3171

1 situation that does not encourage
2 constructive or bold approaches to smoking
3 and health problems, and it also means that
4 the policy committee of lawyers exercise
5 close control over all aspects of the
6 problems.

7 Now, sir, that was written in 1964. 30
8 years later, almost, in 1993, did you reach
9 the same conclusion?

10 A I kind of understood that's what was going
11 on, yes.

12 Q On page 6, Bates No. 104. "Influence of the
13 lawyers." It's at the bottom of the page.
14 Do you see that, Mr. LeBow?

15 A Yes, I do.

16 Q In consequence of the importance of
17 lawsuits, the main power, M-A-I-N power, in
18 the smoking and health situation undoubtedly
19 rests with the lawyers and more particularly
20 with the policy committee of lawyers.

21 Turn the next page, and they list these
22 lawyers. Do you see the name Fred Haas,
23 H-A-A-S, listed as L&M? And -- first do you
24 see that?

25 A Yes, I do.

3172

1 Q That's Liggett?

2 A Yes.
3 Q And have you from your recent looking at
4 documents seen that name?
5 A I've seen it on occasion, yes.
6 Q It says this committee is extremely
7 powerful. It determines the high policy of
8 the industry on all, and they underline all,
9 that's emphasis by them, smoking and health
10 matters. Then they say research, public
11 relations, as well as legal matters.
12 Did I read that correctly?
13 A Yes, you do.
14 Q Did you come to reach the same conclusion in
15 the mid-1990s yourself, Mr. LeBow?
16 A I knew the lawyers were pretty much
17 controlling everything, telling everybody
18 what to say or not to say.
19 Q Page 15, Bates No. 113. Titled subparagraph
20 a, this is called "Smoking and Health
21 Research in the USA." Do you have it,
22 Mr. LeBow?
23 A Yes, I do.
24 Q Smoking and health research by U.S.
25 manufacturers. Smoking and health research

3173

1 by U.S. manufacturers is largely conditioned
2 by two factors: One, the personal beliefs
3 of the presidents of the companies that
4 nothing against smoking has been proved, as
5 mentioned in the introduction to this
6 report. Number 2, the dilemma posed by the
7 lawsuits. The manufacturers have to choose
8 between, A, doing no smoking and health
9 research and being represented in lawsuits
10 as negligent, although, quote, to meet
11 public concern, end of quote, they finance
12 CTR.

13 You know that's the Council for Tobacco
14 Research?

15 A Right.
16 Q And AMA, that's the American Medical
17 Association Research.

18 B, doing smoking and health research
19 and being forced to admit in lawsuits that
20 their experiments have caused cancer in
21 animals. And yet they have made no changes
22 in tobacco smoke to eliminate the tumors.

23 Then it says the manufacturers have
24 chosen A, except for L&M. That's Liggett;
25 right?

3174

1 A Correct.
2 Q Research through A.D. Little. The
3 competition has forced them to adopt some
4 short-term forms of health research.

5 Did I read that correctly?

6 A That's correct.

7 Q To your knowledge, sir, did Liggett & Myers
8 in the 1960s step away from the industry and
9 finance health research?

10 A I think we did some work away from the
11 industry. We did not like -- at the time,
12 and I'm happy to say that my predecessors --

13 MR. OHLEMEYER: Objection, Your
14 Honor, I don't mean to interrupt but this is
15 all hearsay. How can he tell us what
16 happened at the time. The time in question
17 is 1964.

18 THE COURT: '64? I'll sustain
19 that.

20 Q Mr. LeBow, you've come to learn from reading
21 documents and advice from your Counsel that
22 your company did, in fact, stand apart from
23 the industry for a period of time.

24 A That's correct.

25 Q But then you went back and joined hands with
3175

1 them in '64 to '68, didn't you?

2 MR. OHLEMEYER: Objection,
3 argumentative.

4 THE COURT: Overruled. You can
5 answer.

6 Q Didn't you, sir?

7 A I don't know the exact details but I think
8 that's correct.

9 Q That's right. Page 17, Bates No. 115.
10 Under U.S. opinion of TRC research. Under
11 No. 2, Mr. LeBow, do you have that?

12 A Yes.

13 Q The mid-sentence: Against this, both L&M --
14 that's your company -- and Lorillard
15 scientists told us quite bluntly that they
16 considered Tobacco Research Council --
17 that's the United Kingdom group -- was on
18 the correct basis and CTR -- that's the
19 American group -- largely without value.

20 Did I read that correctly?

21 A Yes, you did.

22 Q Mr. LeBow, do you regret your company only
23 being part of the CTR for four years?

24 MR. WAGNER: Objection, Your Honor.

25 A No, I don't regret them being part. I'm
3176

1 glad they got out of CTR.

2 THE COURT: Objection is overruled.

3 Q You're glad they got out.

4 A Yes, out of CTR.

5 Q Based on what you have read, sir, do you
6 believe CTR was a public fraud?

7 MR. OHLEMEYER: Objection, Your
8 Honor, argumentative.

9 THE COURT: Sustained. You don't
10 have to answer that, sir.

11 Q On page 30, Bates No. 128, under the Council
12 for Tobacco Research, the second sentence --
13 second paragraph, I'm sorry, the Scientific
14 Advisory Board of CTR continues to meet and
15 decide on applications for grants to carry
16 out research on what appeared to us to be
17 projects of no more than remote relevance to
18 current problems.

19 Do you understand what it means to
20 spend money on research that has no more
21 than remote relevance to current problems,
22 sir?

23 MR. OHLEMEYER: Objection, Your

24 Honor.
25 MR. WAGNER: Objection.
3177
1 MR. OHLEMEYER: Argumentative and
2 lacks foundation.
3 THE COURT: I'm going to sustain
4 that. Rephrase that, Counselor.
5 Q You read the sentence I just read you.
6 A Yes.
7 Q As an executive of a cigarette company, what
8 does that mean to you, sir?
9 MR. OHLEMEYER: Same objection,
10 Your Honor, lacks foundation, calls for an
11 opinion from this witness.
12 THE COURT: Sustained.
13 Q This says although L&M, that's Liggett, has
14 now joined CTR, this was solely in order to
15 present the united front, and L&M scientific
16 staff are as highly critical of CTR's
17 research policy as ever.
18 Now, sir, do you understand that your
19 company joined CTR for about four years and
20 then got back out?
21 A Yes, I do.
22 Q On page 32, Bates No. 130. Down at the
23 bottom, Mr. LeBow, the next to last full
24 paragraph that begins with the words "the
25 direction." Do you see that?

3178

1 A Yes.
2 Q The direction of public relations policy is
3 essentially in the hands of the lawyers
4 policy committee. The lawyers are anxious
5 to provide house incentive committees with
6 witnesses favorable to their case and
7 generally to encourage statements by
8 scientists attacking the Surgeon General's
9 Report and its supporting evidence.
10 Sir, since 1995, has Liggett decided
11 rather than to attack public health
12 officials in America to cooperate with
13 public health officials?
14 A To cooperate and help them, yes.
15 Q In fact, have you personally gone to the
16 state of Massachusetts and testified that
17 you would be willing even without a law to
18 tell the public, the consumers of
19 cigarettes, what's in cigarette smoke?
20 A Not only willing, but we've done it.
21 Q To your knowledge, did any other cigarette
22 companies voluntarily turn over the
23 ingredients in their cigarettes at that
24 Massachusetts hearing that you appeared at?
25 A On the contrary, they filed lawsuit after

3179

1 lawsuit and appeal after appeal and they're
2 still doing that.
3 MR. MOTLEY: I'm done with that
4 document, Your Honor.
5 Q Mr. LeBow, as a businessman, do you
6 understand what the attorney-client
7 privilege is as a lay person?
8 A Yes, I do.

9 Q Do you understand that you can discuss
10 matters with your attorney and don't have
11 to -- you're not forced to reveal that?
12 A That's correct.
13 Q Would you tell the ladies and gentlemen of
14 the jury whether or not Liggett has
15 voluntarily agreed to waive or, that is,
16 give up their attorney-client privilege and
17 turn over documents to various courts and
18 legislatures so that those courts and
19 legislatures can get an inside look at what
20 goes on at a cigarette company?
21 MR. OHLEMEYER: Objection, Your
22 Honor, it's argumentative, lacks relevance
23 and under Rule 403 should be excluded.
24 MR. MOTLEY: Your Honor, he's
25 entitled to waive attorney-client privilege.

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1 MR. WAGNER: It doesn't have any
2 relevancy to this action, Your Honor.
3 MR. MOTLEY: It certainly does.
4 I've got a document I'm going to show him.
5 THE COURT: On that representation,
6 I'll overrule the objection.
7 Q Has Liggett waived its attorney-client
8 privilege?
9 A Yes, we have. We waived all attorney-client
10 privileges for all the documents relating to
11 our smoking and health in the past.
12 Q Now, the law firm that -- the lawyers who
13 left the law firm they were with but who had
14 represented your company for 30, 40 years,
15 they joined a firm called Latham,
16 L-A-T-H-A-M, and Watkins; is that correct?
17 A That's correct.
18 Q In their New York City office?
19 A That's correct.
20 Q Did there come a time in 1996 when those
21 lawyers and you no longer were attorney and
22 client?
23 A Well, after I reached a settlement with
24 the --

25 MR. MOTLEY: Excuse me. You can't
3181

1 talk about that.
2 THE WITNESS: Sorry.
3 THE COURT: I think you can answer
4 that yes or no.
5 Q Did there come a time.
6 A Yes.
7 Q You did?
8 A I'm sorry. Repeat the question.
9 Q Did there come a time when you and your
10 lawyers parted ways?
11 A Yes.
12 Q And what date approximately -- don't tell us
13 the reason for it, but did there come a
14 time --
15 A Yes, in March of '96. They fired me.
16 Q I didn't know lawyers did things like that.
17 A Well, these lawyers did.
18 MR. OHLEMEYER: Excuse me, Your
19 Honor. I don't think that's a question.

20 MR. MOTLEY: That was a gratuitous
21 comment.
22 THE COURT: That will go out. The
23 jury will disregard Mr. Motley's comment.
24 MR. MOTLEY: Your Honor, I don't
25 know that you've met Mr. McConnell. He's

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1 admitted in this case. He's my law partner.
2 MR. McCONNELL: Good morning.

3 THE COURT: I thought I saw a new
4 face there.

5 MR. MOTLEY: I'm sorry. I meant to
6 do that earlier. We move the admission of
7 20462.

8 MR. SHOCKLEY: Against what
9 defendants?

10 MR. MOTLEY: Against Liggett.

11 THE COURT: Against Liggett only?

12 MR. MOTLEY: Yes, Your Honor.

13 MR. OHLEMEYER: Your Honor, may I
14 ask a few questions as to foundation to an
15 objection if there is going to be inquiry on
16 this document?

17 THE COURT: Go ahead.

18 QUESTIONS BY MR. OHLEMEYER:

19 Q Mr. LeBow, my name is Bill Ohlemeyer, we've
20 not met. I'm correct you didn't own the
21 Liggett & Myers company in 1976, did you?

22 A That's correct, I did not.

23 Q You never met a man by the name of D.W.
24 Conning, have you?

25 A Not to my knowledge, no.

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1 Q Never talked with Mr. Conning, have you?

2 A No, I haven't.

3 Q In fact, you've never gone back and talked
4 to any of the scientists who may or may not
5 have been employed at the Liggett Group
6 prior to the time you bought the stock in
7 that company, have you?

8 A No, that's correct.

9 MR. OHLEMEYER: Your Honor, I don't
10 understand how this witness -- how a
11 foundation can be laid for this witness to
12 discuss anything in this document.

13 THE COURT: I haven't heard any
14 foundation yet. So go ahead. Let me hear
15 some foundation and then I'll rule on the
16 objection.

17 MR. MOTLEY: This document is dated
18 May 15, 1978, Your Honor.

19 Q Do you see in the bottom right-hand corner
20 it has a number LG0203941?

21 A Yes, I see that.

22 Q Do you understand that that's Liggett's
23 Bates numbers?

24 MR. OHLEMEYER: Objection, Your
25 Honor. Mr. Motley is testifying.

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1 THE COURT: If he knows that. Do
2 you know that, sir?

3 A I don't know for a fact, but -- I don't know
4 for a fact, Your Honor.

5 MR. MOTLEY: This document was a
6 Liggett-only attorney-client privilege
7 document. I'm going to ask him if that's
8 so. My representation is so and I'm about
9 to prove it. If he will waive that
10 attorney-client privilege for the jury.

11 MR. OHLEMEYER: Your Honor, may we
12 approach?

13 (Bench discussion.)

14 MR. MOTLEY: Would it be
15 appropriate to read the stipulation we just
16 reached, Your Honor, that it's a Liggett
17 document? That's the only stipulation we've
18 reached and it is, in fact, a Liggett
19 document.

20 MR. OHLEMEYER: That has no
21 relevance to anything that's before the
22 Court or jury at this point, Your Honor. I
23 think Mr. Motley -- you ought to ask
24 Mr. Motley to ask questions from the
25 witness, we'll get answers from the witness

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1 instead of testimony from Mr. Motley.

2 THE COURT: The Court noted what
3 the stipulation was at the bench.

4 Go ahead, Counselor.

5 BY MR. MOTLEY:

6 Q Mr. LeBow, just assume for the moment that
7 this is a Liggett document, okay?

8 A Okay.

9 Q And to the extent, Mr. LeBow, that this
10 document represents an attorney-client
11 privilege, do you waive that privilege at
12 this time?

13 MR. WAGNER: Objection, Your Honor,
14 as to relevancy.

15 THE COURT: Overruled.

16 A Yes, I do.

17 Q You do waive it. All right, sir.

18 MR. MOTLEY: Your Honor, we move to
19 admit it against Liggett only at this time
20 as Exhibit 20462.

21 THE COURT: Any objection to the
22 admission?

23 MR. OHLEMEYER: Yes, Your Honor,
24 lacks relevance, lacks foundation.

25 THE COURT: Objection is noted and

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1 overruled. 20462 will be admitted only,
2 ladies and gentlemen, as to Liggett Group
3 only and not to any other defendant.

4 (Plaintiffs' Exhibit(s) 20462 received
5 in evidence.)

6 BY MR. MOTLEY:

7 Q Mr. LeBow, look, please, at page 1. It says
8 the concept of a less hazardous cigarette.

9 A Yes.

10 Q Do you have a layman's understanding of what
11 a less hazardous cigarette would be?

12 MR. OHLEMEYER: Objection, Your
13 Honor. Relevance, lack of foundation from
14 this witness.

15 MR. MOTLEY: It's a Liggett

16 document.
17 THE COURT: The question was do you
18 have a layman's understanding. You can
19 answer that yes or no.
20 A Yes, I do.
21 Q There are broadly two sets of problems which
22 attend to the concept of a safer cigarette.
23 Did you see that word safer cigarette
24 there, sir?
25 A Yes, I do.

3187

1 Q Does it have "safer" in quotation marks?
2 A No, it does not.
3 Q The first is concerned with the ethical
4 question: Is it morally permissible to
5 develop a safe method for administering a
6 habit-forming drug when, in so doing, the
7 number of addicts will increase? End of
8 quote.
9 Did I read that correctly?
10 A Yes, you did.

11 MR. OHLEMEYER: Excuse me, Your
12 Honor, Mr. LeBow is not here to tell
13 Mr. Motley and the jury that he read
14 something correctly from a document. I
15 object to this kind of inquiry.

16 THE COURT: Where are you going
17 with this?

18 MR. MOTLEY: I'm going to ask him,
19 Your Honor, if this type of information was
20 a part and parcel of his decision to place a
21 warning label on Liggett cigarettes and, in
22 fact, they are addictive.

23 MR. WAGNER: Judge, that's why it's
24 improper for him to keep referring to
25 extraneous documents to lead this witness,

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1 question him about what's said in a
2 document. I mean, he needs to put questions
3 to the witness, not put documents in front
4 of him written by somebody else 30 or 40
5 years and then ask this witness questions
6 about it, whether he agrees with it, doesn't
7 agree with it and things of this sort. It's
8 all improper.

9 MR. MOTLEY: You've admitted it in
10 evidence.

11 THE COURT: I think it goes to the
12 weight. Go ahead, Mr. Motley.

13 Q Sir, let me phrase the question to you this
14 way. First of all, I did read that
15 correctly for the record?

16 A Yes.

17 Q Now, is this type of information, this type
18 of question, whether or not smoking is
19 addictive, is that part of the information
20 and understanding that you reached in
21 directing your company to place a warning
22 label on Liggett cigarettes such as we
23 showed the jury that says smoking is
24 addictive?

25 A Yes.

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1 Q Thank you, sir.
2 Sir, is it the position of Liggett
3 today in 1998 that cigarette smoking is a
4 cause of lung cancer in human beings?
5 MR. WAGNER: Objection, Your Honor,
6 no foundation, relevancy.
7 MR. MOTLEY: It's the position of
8 the company.
9 THE COURT: Overruled. You may
10 answer.
11 A Yes, that is our position.
12 Q It is your position?
13 A Yes.
14 Q That cigarette smoking causes lung cancer?
15 A Yes.
16 Q Is it your position that cigarette smoking
17 causes emphysema?
18 MR. WAGNER: Same objection and
19 it's more outside the issues in this case.
20 THE COURT: Noted and overruled.
21 You may answer.
22 A Yes.
23 Q Let me ask you -- did you answer that?
24 A The answer is yes.
25 Q Let me ask you this question, sir. You know
3190
1 former Surgeon General Everett Koop, do you
2 not?
3 A I know of him, yes.
4 Q Have you met former Food and Drug
5 Administration Commissioner David Kessler?
6 A Yes, I've met him.
7 Q Let me ask you this question, sir: Do you
8 agree with Drs. Koop and Kessler --
9 MR. WAGNER: Judge, he's going to
10 read again from something that's in a
11 document, ask this witness questions as to
12 whether he agrees with it. It's asking the
13 witness to comment upon hearsay.
14 MR. MOTLEY: It is not, Your Honor.
15 THE COURT: Whether or not he
16 agrees with it, the objection is sustained.
17 MR. MOTLEY: Your Honor, this
18 particular document, I've placed the
19 predicate in the record with Dr. Burns when
20 he was on the witness stand, that it was
21 reliable and authoritative.
22 MR. WAGNER: I don't know what
23 document we're talking about at this point.
24 THE COURT: We're talking about the
25 Everett Koop report.

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1 MR. MOTLEY: The Koop-Kessler
2 Report of 1997. Not the Surgeon General's
3 Report but the Commission Report of 1997.
4 THE COURT: Mr. Wagner's last
5 objection was sustained.
6 Q All right. Sir, does your company, as
7 opposed to you personally -- and you're the
8 spokesman for your company here today;
9 correct?
10 A Correct.
11 Q Let me ask if you, as the spokesman for your

12 company, would agree with the following:
13 Nicotine makes the product addictive. Do
14 you agree with that?
15 MR. WAGNER: Objection, Your Honor,
16 as to foundation. And if I can just have a
17 continuing objection to asking this witness
18 to comment upon scientific and medical
19 matters when there is no foundation
20 established that he has any scientific
21 background, I won't have to keep making
22 these objections.
23 THE COURT: I'll note that
24 objection, Counselor, on a continuing basis.
25 The last is overruled.

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1 Repeat your question.
2 Q Yes, sir. Do you agree with this statement:
3 That nicotine makes the product -- talking
4 about cigarettes -- addictive?
5 A Yes.
6 Q Your company agrees with that?
7 A That's correct.
8 Q Does your company agree that the toxin, the
9 additives, make it deadly? Do you agree
10 with that?
11 A There is some things in there make it
12 deadly, yes.
13 Q And that the additives make it more consumer
14 acceptable like sweetening a poison. Does
15 your company agree with that statement, the
16 additives make it more consumer acceptable
17 like sweetening a poison?
18 A I don't think we've ever used the words
19 sweetening like a poison. It makes them
20 more addictive and people more addicted to
21 the product.
22 Q Mr. LeBow, in this case your company has
23 filed an answer and denied that Mildred
24 Wiley died of lung cancer. I ask you to
25 assume that, sir. Do you know whether your

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1 company is going to bring a doctor in here
2 to testify that Mildred Wiley did not die of
3 lung cancer?
4 MR. OHLEMEYER: Objection, Your
5 Honor, it's argumentative.
6 MR. WAGNER: This is really beyond
7 the pale now, Your Honor.
8 THE COURT: I agree. I agree.
9 Sustained.
10 Q Mr. LeBow, does your company have any reason
11 to disagree with the Environmental
12 Protection Agency that environmental tobacco
13 smoke is a Class A human carcinogen?
14 MR. WAGNER: Objection. Lack of
15 foundation.
16 THE COURT: Overruled. You may
17 answer that.
18 A We have no reason to disagree with that
19 right now.
20 MR. MOTLEY: Give me 30864. Your
21 Honor, I anticipate that there may be an
22 objection to this.

23 THE COURT: This is not in evidence
24 yet, Counselor?

25 MR. MOTLEY: No. This is one of
3194

1 the ones that we wanted to talk to you about
2 that we didn't get to.

3 THE COURT: Thank you.

4 MR. MOTLEY: Let me ask some
5 foundational questions first.

6 Q Mr. LeBow, I know it's difficult to read the
7 letterhead of this document, but do you
8 recognize the name Webster & Sheffield?

9 A Yes, I do.

10 Q Who was Webster and Sheffield?

11 A This was Liggett's outside law firm during
12 this period, the same lawyers who went to
13 Mudge Rose and then went to Latham Watkins.
14 The same group of lawyers who had been there
15 for 30, 40 years.

16 Q Do you recognize the name Joseph Greer, vice
17 president and general counsel, Liggett &
18 Myers Tobacco Company?

19 A Yes. I believe he was the predecessor
20 attorney general -- excuse me, general
21 counsel before Joe Murray, Josiah Murray.

22 Q And Mr. LeBow, to the extent that Liggett
23 has a privilege, attorney-client privilege
24 as to this document, do you waive that
25 privilege?

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1 A Yes. Yes, sir.

2 MR. WAGNER: Objection.

3 THE COURT: The last objection is
4 overruled. Your answer, sir?

5 A Yes, I do.

6 MR. MOTLEY: Your Honor, we move
7 the admission of 30864 at this time.

8 THE COURT: Any objection?

9 MR. OHLEMEYER: Yes, there is, Your
10 Honor. I would like to be heard on it at
11 side bar.

12 MR. MOTLEY: I anticipate this may
13 be lengthy, Your Honor.

14 THE COURT: Let's take a
15 five-minute break. The jury may go with the
16 bailiff and we'll break for five minutes.
17 Don't talk among yourself about the case or
18 anyone else.

19 MR. CASSELL: All rise.

20 (Jury not present)

21 THE COURT: Sir, you may step down,
22 if you like, during this. You can go get a
23 drink or whatever you like.

24 MR. WAGNER: You don't happen to
25 have another copy of that, by any chance, do

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1 you? We can't find our copy.

2 THE COURT: Be seated. Jury is not
3 now present. Before the Court is 30864,
4 which has been identified as a letter to
5 Joseph Greer, vice president and general
6 counsel, Liggett & Myers Tobacco. What's
7 the objection?

8 MR. OHLEMEYER: Your Honor, the
9 objection is relevance. The objection is
10 foundation. The objection is prejudicial
11 value outweighing its probative effect. And
12 the other objection is I think that there is
13 probably a joint defense privilege which
14 could be asserted to some or all of what
15 Mr. Motley is about to embark on.

16 This is somebody's notes of a meeting
17 of general counsel where they are obviously
18 talking about litigation or anticipated
19 litigation. And I just don't understand --
20 we could deal with the privilege issues or
21 we could deal with the probative value
22 issues or we could deal with relevance
23 issues.

24 This man is a fact witness who came
25 here to tell the jury that he put a warning

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1 on his package. He has done that. Now
2 Mr. Motley is using him as a foil so that he
3 can make a lot of jury argument under the
4 guise of putting documents in evidence --
5 it's a waste of time. I think it's
6 confusing and prejudicial and I think Your
7 Honor has the discretion to ask Mr. Motley
8 to move on and we can deal with these
9 documents and the evidentiary issues at a
10 more appropriate point in time but there is
11 nothing this witness needs to be here to do
12 to discuss with respect to these documents.

13 MR. MOTLEY: You may be surprised,
14 Your Honor, but I don't disagree with
15 Mr. Ohlemeyer except to the extent that when
16 Mr. LeBow leaves, if they come up with some
17 kind of, well, he didn't properly
18 authenticate this as being a Liggett
19 document or something like that, I don't
20 need to ask him the substance of this
21 document. I do move its admission and I'll
22 be glad, at the appropriate time, to state
23 why, Your Honor.

24 THE COURT: I think that would be
25 better. I agree. We will -- I'll take

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1 30864 under advisement until we can discuss
2 it further, Counsel, but I think you've made
3 a partial foundation.

4 MR. SHOCKLEY: May I ask Counsel
5 against whom he's offering that document?

6 MR. MOTLEY: We offer it against
7 all defendants, Your Honor.

8 THE COURT: All defendants.

9 MR. SHOCKLEY: Do you want to hear
10 objections on that document now?

11 THE COURT: Not now. See if the
12 jury can come back. Be seated. We need a
13 couple minutes, apparently.

14 MR. MOTLEY: For the same reason,
15 Your Honor, can we dash out in the hall?

16 THE COURT: Let's take five
17 minutes.

18 (A brief recess was taken.)

19 MR. CASSELL: All rise.
20 THE COURT: Be seated. Jury is
21 back in its entirety.
22 Mr. LeBow.
23 MR. MOTLEY: I think they're out in
24 the hall, Your Honor.
25 THE COURT: Would you again state
3199

1 your name for the record.
2 THE WITNESS: Bennett LeBow.
3 THE COURT: Do you recognize, sir,
4 that you are still under oath?
5 THE WITNESS: Yes, Your Honor.
6 THE COURT: All right. Ladies and
7 gentlemen, I dealt with a document while you
8 were out of the room, 30864, and I have
9 elected to hear some further argument on it.
10 So I'm going to make no finding whether it
11 should be admitted or not at this point.
12 Go ahead, Mr. Motley.

13 BY MR. MOTLEY:

14 Q Mr. LeBow, does your company agree, as a
15 matter of principle, that consumers of a
16 consumer product are entitled to know all
17 the dangers of using that product of which
18 the manufacturer has become aware?

19 A Yes, sir, they do.

20 Q Would you admit that your company, prior to
21 your purchasing it, did not reveal all of
22 the dangers that you have learned were known
23 to them at that time?

24 MR. OHLEMEYER: Objection, Your
25 Honor, lacks foundation.

3200

1 THE COURT: Overruled.

2 A Yes, I agree with that, we did not.

3 Q You failed to do that?

4 A That's correct.

5 Q Mr. LeBow, are you proud of what you've
6 done, that is breaking with the party line?

7 MR. WAGNER: Objection, Your Honor
8 as to whether he's proud or not. Relevancy.

9 THE COURT: You may answer.

10 A I'm very proud and would do it again in a
11 second. It was the right thing to do.

12 Q Yet, as a result of that, your company has
13 lost business; correct?

14 A Our market shares, you can see from the
15 documents from the Maxwell Report, have gone
16 down significantly since we've done that,
17 yes.

18 Q Was your company sued by the other companies
19 in North Carolina in court to try to prevent
20 you from releasing your documents?

21 MR. OHLEMEYER: Objection, Your
22 Honor, relevance.

23 THE COURT: Sustained. You don't
24 have to answer that.

25 MR. MOTLEY: No further questions.

3201

1 THE COURT: Any questions,

2 Mr. Ohlemeyer?

3 MR. OHLEMEYER: I have a few, Your

4 Honor.
5 CROSS-EXAMINATION
6 BY MR. OHLEMEYER:
7 Q Can you see that, Mr. LeBow?
8 A Yes, I can.
9 Q Do you know, Mr. LeBow, the names of the
10 parties to this lawsuit?
11 A The corporate names?
12 Q The plaintiffs or the defendants.
13 A Yes, I know the plaintiffs and defendants,
14 yes.
15 Q Who are the named plaintiffs in this
16 lawsuit?
17 A A Ms. Wiley. I don't know any of the other
18 plaintiffs, if there are.
19 Q Mr. LeBow, am I correct that you own most of
20 the stock in a company known as the Brooke
21 Group; is that right?
22 A Own a controlling interest, not most of the
23 stock, no.
24 Q What do you mean by controlling interest?
25 A I have about 50 percent.

3202

1 Q An that company owns some other companies,
2 right?
3 A Yes.
4 Q And is the Liggett one of those companies or
5 is there another level?
6 A There is an intermediate wholly-owned
7 subsidiary called BGLS.
8 Q BG?
9 A LS. It stands for Brooke Group Limited
10 Subsidiary.
11 Q What does that company make?
12 A Nothing. It's just a holding company.
13 Q What does the Brooke Company make?
14 A It's also a holding company of other
15 companies.
16 Q Explain for us what that means, a holding
17 company.
18 A It's a company which owns the stock of
19 various other operating companies and it
20 does -- you know, it directs the strategy,
21 the financing, the legal, the accounting,
22 the issues of other operating companies.
23 Q Are you telling the jury that the Brooke
24 Group runs the day-to-day operations of
25 BGLS?

3203

1 A Yes, that's correct.
2 Q And then who does BGLS own?
3 A It owns quite a few companies. It's owns
4 Liggett Group, 100 percent of that.
5 Q What does Liggett Group make?
6 A Liggett Group manufactures cigarettes.
7 Q So this is a holding company. Does that
8 mean it holds stock? Is that the point of
9 the words "holding company"?
10 A That's priorly what it means, yes.
11 Q And this is a holding company?
12 A That's correct.
13 Q And this is a company that makes something;
14 right?

15 A Yes.
16 Q Manufacturing?
17 A Right.
18 Q What's the point of all this?
19 A Well, there are other companies there, so
20 you have to have a corporate structure.
21 Q Well, why do you need a corporate structure?
22 A Well, you have to have, just for management
23 control and for accounting purposes, for
24 receipt purposes, tax purposes, many reasons
25 why.

3204

1 Q Liability purposes?
2 A No. No liability purposes.
3 Q Is the law -- does the law recognize these
4 as three different companies or one company?
5 A They recognize them as three different
6 companies.
7 Q Is a debt of the Liggett Group a debt of the
8 Liggett Group or is it a debt of the Brooke
9 Group?
10 A Say it again.
11 Q If the Liggett Group goes out and borrows
12 money, is that a debt of the Liggett Group
13 or Brooke Group?
14 A Debt of the Liggett Group.
15 Q If the Liggett Group didn't pay on that
16 debt, could somebody sue the Brooke Group?
17 A No.
18 Q That's the reason you have separate
19 companies; one of the reasons is to set up
20 independent companies so you can sort out
21 the liabilities and the assets of each
22 company; right?
23 A No, that's not the main reason. Many times
24 Brooke Group guarantees some of the debt of
25 the subsidiary companies.

3205

1 Q Just because you own stock in the Brooke
2 group -- strike that. I'll come back to it.
3 You're a businessman, isn't that right?
4 A That's correct.
5 Q Mr. Motley is an attorney?
6 A Yes.
7 Q And what you do is buy and sell businesses?
8 A Mostly buy. Very rarely sell.
9 Q Are you -- you mentioned the word financial
10 opportunities. You're in the financial
11 opportunities business?
12 A When a good financial opportunity comes
13 along in a company, yes, we exercise an
14 option to buy it.
15 Q Some people call people in that business
16 corporate raiders, right?
17 A We do not raid the companies. We did not
18 raid Liggett, for example. There was no
19 raid there at all.
20 Q What's your understanding of what a
21 corporate raider is?
22 A A corporate raider is somebody who goes
23 after a company where they don't agree to
24 sell, they're fighting you to sell.
25 Q So it's like a hostile takeover?

1 A It a hostile takeover, correct.
2 Q Lot of times what those people do is do
3 something called a leverage buyout to buy
4 the company?
5 A Sometimes, yes, sometimes no. Many -- no,
6 that's not totally true. Many times never.
7 Q And what some people do is buy companies so
8 that they can sell pieces of them; right?
9 A Some people do that maybe.
10 Q Am I right?
11 A Sometimes, yes.
12 Q But that's not what you do?
13 A I haven't done that, no.
14 Q In fact, you're kind of famous, as it were,
15 for buying companies so that you can hold
16 onto them and improve their profitability
17 and increase their stock price; right?
18 A Well, yes, I buy -- my expertise is buying
19 troubled companies, and if possible,
20 sometimes not possible, but if possible, you
21 know, making them profitable, making them
22 successful.
23 Q So instead of one of these guys who buys a
24 company and then sells pieces of it off to
25 enrich himself, you buy companies that are

1 troubled and try to run them more
2 effectively or more efficiently than the
3 people who were running them so you can
4 increase their profitability and raise their
5 stock price?
6 A That's our main goal, yes.
7 Q And you fancy yourself as pretty good at
8 that?
9 A I've done pretty well in that, yes.
10 Q And, for example, as you do that, you hire
11 people to run the day-to-day operations of
12 those companies; right?
13 A That's correct.
14 Q I mean, you actually aren't down there at
15 the Liggett Group in the plant or in the
16 factory talking with people to see how
17 things are going, are you?
18 A That's correct.
19 Q When you -- let's start -- when did you
20 purchase the stock of the Liggett Group?
21 A When?
22 Q Yes.
23 A October '86.
24 Q I think you just told me they were -- what
25 were your words -- financially troubled?

1 A In this case there was a very willing
2 seller.
3 Q But they were in some kind of financial --
4 A No, in this case they were not in financial
5 trouble at the time. At the time.
6 Q I thought I heard you say that.
7 A No. I said that that's my expertise to go
8 after financially troubled companies. I
9 didn't say Liggett was financially troubled.
10 Q What was Liggett's market share when you

11 bought them?
12 A I don't recall exactly. I think somewhere
13 in the 3 to 4 percent range.
14 Q Were they a profitable company at the time?
15 A Yes.
16 Q But you thought they could be made a more
17 profitable company?
18 A Or at least maintain the profits they had;
19 either way.
20 Q Let's go back into the 1950s. What do you
21 know about Liggett's market share back in
22 the '50s?
23 A It was higher.
24 Q They had a brand called Chesterfield; right?
25 A Yes.

3209

1 Q In fact, in the '50s, wasn't it the most
2 popular brand of cigarettes in the country?
3 A I don't recall. I don't know.
4 Q Do you know how many billions of
5 Chesterfield cigarettes got sold back in the
6 '50s?
7 A No, I never looked.
8 Q But you do know that their market share,
9 Liggett's market share, was higher in the
10 '50s than it was when you bought them in
11 '86; right?
12 A Absolutely.
13 Q And it was higher in the '60s, wasn't it?
14 A I believe so, yes.
15 Q And it was higher in the '70s, wasn't it?
16 A Yes.
17 Q Now, am I correct, Mr. LeBow, that when you
18 bought the stock in the Liggett Group in
19 1986, the company was involved in some
20 lawsuits?
21 A There were a few lawsuits, individual
22 lawsuits pending, yes.
23 Q Tell us what a Securities and Exchange
24 Commission Form 10K is?
25 A Form 10K is the filing annually that you

3210

1 file with the SEC to report the accounting
2 and the earnings and the assets of the
3 company.
4 Q And the law requires you to file it?
5 A Once a year, that's correct.
6 Q You hire accountants and lawyers and
7 financial people to help you put it
8 together?
9 A That's correct.
10 Q And sometimes they're this thick, sometimes
11 they're even thicker; right?
12 A That's correct.
13 Q You're certainly familiar with the Form 10Ks
14 that have been filed for the Liggett Group
15 while you've owned stock in that company;
16 right?
17 A Yes.
18 Q And those forms are sometimes referred to as
19 consolidated forms; is that right?
20 A Yes, they consolidate the subsidiaries.
21 Q So even though these are separate companies,

22 the law requires you to report all of their
23 financial information in one form; right?
24 A Well, Brooke Group would consolidate
25 Liggett; Liggett would consolidate its

3211

1 subsidiaries.

2 Q That's my point, isn't it?

3 A Yes.

4 Q Even though they report on the same form,
5 they're separate companies.

6 A They may be separate companies, yes.

7 Q Now, let me read something to you from the
8 '88 Form 10K and see if it refreshes your
9 recollection about what you knew or didn't
10 know about the lawsuits when you bought
11 Liggett in '86. There was a section on
12 legal proceedings, wasn't there?

13 A Yes.

14 Q There always is?

15 A Correct.

16 Q And it comes under the section entitled,
17 Contingencies; right?

18 A That's correct.

19 Q One of the reasons you report that under
20 contingencies is you really don't know
21 what's going to happen in lawsuits
22 sometimes, do you?

23 A That's correct.

24 Q And in 1988 the statement was made, "As new
25 cases are commenced, the costs associated

3212

1 with defending such cases and the risks
2 attendant to the inherent unpredictability
3 of litigation increase."

4 Do you recall reading that type of
5 statement in your Form 10K?

6 A Not particularly. It was written by the
7 same lawyers who gave me the same advice,
8 but they wrote it.

9 Q Well, you file this with the government,
10 don't you?

11 A The management of Liggett filed it. And the
12 lawyers wrote those sections.

13 Q So the management of Liggett is responsible
14 for filing this with the government.

15 A Correct. And the lawyers of Liggett are
16 responsible for writing those types of
17 sections, yes.

18 Q And you read these before they're filed,
19 don't you?

20 A No, not all the time, no, I do not.

21 Q You don't read them?

22 A No, not necessarily.

23 Q So you don't recall reading that, "No
24 assurance can be given, however, that the
25 plaintiffs in such actions pending against

3213

1 Liggett will not prevail"?

2 A That's correct. I'm sure it says that, but
3 I don't necessarily recall reading it.

4 Q Now, by 1989, Liggett was still involved in
5 lawsuits, wasn't it?

6 A Yes, a few lawsuits.

7 Q And, again in 1989, let me see if this
8 refreshes your recollection about how the
9 company characterized those lawsuits. "It
10 is possible that a determination of
11 liability of other adverse ruling against
12 Liggett or the other cigarette manufacturers
13 in one or more of these cases, even if such
14 rulings are not final, could result in the
15 establishment of reserves in respect to such
16 pending or future actions."

17 What does that mean?

18 A If the lawyers were to think all of a sudden
19 that there is liability, there would be some
20 reserves put aside for potential liability.

21 Q Which means the company has to set aside
22 money for that?

23 A Or accounting. Doesn't mean you have to put
24 money away, but at least account for it on
25 an accounting basis. It doesn't mean that

3214

1 you actually put money away.

2 Q 1990, Securities and Exchange Commission,
3 Liggett Group, another section on legal
4 proceedings; right?

5 A I'm sure every year, like you said.

6 Q Section in the 1993 Form 10K on legal
7 proceedings; right?

8 A Correct.

9 Q In 1995 the section is described in what's
10 called a note, right, like an appendix?

11 A All these are notes. I don't know the
12 distinction.

13 Q Let me read a statement to you from the 1995
14 10K and let me ask you whether this --

15 A Excuse me. This is from 1995 year or filed
16 in '96?

17 Q Filed in March of '95.

18 A That's for '94 then. You're reading the
19 wrong thing. You're saying them all wrong.

20 Q Let me read it to you, sir, and see if this
21 refreshes your recollection about what your
22 company said about these lawsuits in the
23 Securities and Exchange Commission filing.

24 "Since 1954, Liggett and other United
25 States cigarette manufacturers that have

3215

1 been named as defendants in a number of
2 direct and third party actions predicated on
3 the theory that they should be liable for
4 damages from cancer and other adverse health
5 effects alleged to have been caused by
6 cigarette smoking or by exposure to
7 secondary smoke from cigarettes."

8 That for obviously was known to the
9 Liggett Group in 1995; right?

10 A It was known to the lawyers employed by
11 Liggett Group who advised us for the 40
12 years and who wrote those sections, yes.

13 Q And it would have been known to anyone at
14 the company who read one of these; right?

15 A Yes. We were being advised by the attorneys
16 and we took the advice of the attorneys at
17 the time.

18 Q It would have been known by anyone in the
19 government who read this; right?
20 A Whoever read it; people can read it.
21 Q There's a section here about that Cippollone
22 lone case that Mr. Motley asked you about;
23 remember?
24 A Yes.
25 Q Do you remember that case actually was tried

3216

1 in a court in New Jersey right about the
2 time you bought the company.
3 A Correct.
4 Q And the case generated a lot of publicity,
5 didn't it?
6 A Some.
7 Q The stock analysts and the financial people
8 were watching it very closely?
9 A I wasn't watching them, so I don't know at
10 the time.
11 Q And the case was appealed to an appellate
12 court?
13 A Yes.
14 Q And that appeal went to the Supreme Court of
15 the United States?
16 A Yes.
17 Q Do you recall that the Supreme Court
18 decision on the Cippollone case barred
19 plaintiffs from asserting claims --
20 MR. MOTLEY: Excuse me, Your Honor.
21 MR. OHLEMEYER: I'm just reading
22 from his Form 10K, Your Honor.
23 MR. MOTLEY: Well, if we're going
24 to debate what the Supreme Court said, Your
25 Honor has already ruled on that.

3217

1 MR. OHLEMEYER: All I want to do,
2 Your Honor, is ask Mr. LeBow if he agrees
3 with what his company made in a filing with
4 the government in 1995.
5 THE COURT: Go ahead.
6 MR. MOTLEY: Excuse me, Your Honor,
7 could I have a copy of this? We've given
8 them copies. Do you want me to take your
9 copy?
10 MR. OHLEMEYER: I'll give it to you
11 when I'm done.
12 MR. MOTLEY: I think it's normally
13 appropriate that I get to look at what he's
14 reading.
15 THE COURT: Do you have another
16 copy, Counsel?
17 MR. OHLEMEYER: I don't, but I'll
18 be happy to --
19 MR. MOTLEY: It will take five
20 seconds to look at it.
21 THE COURT: Go ahead, Counsel.
22 Q So somewhere shortly after, you think,
23 Mr. LeBow, the Cippollone case was tried?
24 A I believe it was '88, 89, something of that
25 nature.

3218

1 MR. MOTLEY: Now, Your Honor, I do
2 want to approach about this document. I

3 thought that's where he was going.
4 THE COURT: All right.
5 (Bench discussion)
6 THE COURT: The last objection is
7 overruled. You may continue.
8 Q Mr. LeBow, let me back up a minute.
9 Mr. Motley asked but the Cippollone case;
10 right?
11 A Yes.
12 Q And he asked you about package warnings and
13 we'll talk about those in a minute; right?
14 A Yes.
15 Q But you know that the United States Supreme
16 Court decided some issues in the Cippollone
17 case, didn't it?
18 A Yes.
19 Q And one of the things they decided,
20 according to the 10K that was filed on
21 behalf of the Liggett Group in March of
22 1995, was that the Cippollone decision bars
23 plaintiffs from asserting claims that after
24 the effective date of the 1969 Act -- that's
25 the Cigarette Labeling Act.

3219

1 A Yes.
2 Q -- the tobacco companies either failed to
3 warn adequately the claimed health risks of
4 smoking or sought to neutralize those
5 claimed risks in their advertising and
6 promotion of cigarettes.
7 Do you recall that?
8 A I recall that somewhat, yes.
9 Q And what that meant and what your
10 understanding of that, was that the Supreme
11 Court had said that since Congress wrote the
12 warnings that went on cigarette packages,
13 they were adequate to warn people of the
14 claimed risks of smoking?
15 A Based upon the information given to the
16 Supreme Court at the time, about the
17 documents that were available at the time,
18 that's what they said, based upon what was
19 available at the time.
20 Q Well, are you telling us how the Supreme
21 Court makes its decisions?
22 A No. I'm just telling you what I know the
23 facts to be.
24 Q Do you know whether the Supreme Court made
25 their decision based on a law that Congress

3220

1 had passed or based on any kind of evidence
2 that lawyers had put in front of them?
3 A I have no idea.
4 Q All right. Am I correct, Mr. LeBow, that in
5 the Form 10K your company filed in 1997, for
6 the year ending '96, that the fact that
7 Philip Morris -- well, that the fact that
8 Liggett had been receiving certain financial
9 and other assistance from other cigarette
10 companies in deferring the costs and other
11 burdens of the lawsuits was reported and
12 disclosed?
13 A That's correct.

14 Q So it wasn't a secret, right?
15 A No, it was not a secret.
16 Q And, in fact, the 1996 10K sets out the fact
17 that as new cases are commenced, the costs
18 associated with defending such cases and the
19 risks attendant to the inherent
20 unpredictability of the litigation continue
21 to increase.
22 A That's correct.
23 Q So it's fair to say that as of 1996, the
24 cost to you of defending lawsuits was
25 increasing; right?

3221

1 A Well, you're reading a document from '97,
2 not '96.
3 Q It was talking about what happened in '96.
4 Right?
5 A No. But when you write those paragraphs,
6 they're written -- they're really dated the
7 date that they're filed.
8 Q Okay.
9 A That's March of '97.
10 Q Okay. March of '97. So that's a fact,
11 right?
12 A Yes.
13 Q And it's also a fact that as of March of
14 '97, there were 108 cases pending against
15 Liggett where people had made claims for
16 injury resulting from smoking, addiction,
17 and from exposure to ETS; right?
18 A Correct.
19 Q And, again, there's a reference to that
20 Cippollone case and the Supreme Court
21 decision in this Form 10K, isn't there?
22 A You have it, Counselor, so I guess there is.
23 I mean, I don't know.
24 Q Now, tell me what Liggett's market share was
25 on about March of 1997.

3222

1 A Under 2 percent. I don't know exactly.
2 Q Was Liggett still profitable in March of
3 1997?
4 A No.
5 Q So despite your best efforts, you hadn't
6 been able to accomplish yet with Liggett
7 what you had with some of your other
8 companies?
9 A That's correct.
10 Q Let me ask you a couple questions,
11 Mr. LeBow, about the ingredients that people
12 add to tobacco when they make cigarettes. I
13 want to make sure we're all clear here.
14 You're not suggesting to the jury that that
15 list of ingredients, the things that people
16 add to tobacco when they make cigarettes,
17 isn't provided to the government, are you?
18 A I don't think it's provided on a brand
19 basis. It's provided on a gross basis, but
20 not on this kind of specific basis that we
21 provided it.
22 Q It's provided to the government pursuant to
23 a law; isn't that right?
24 A I believe there is some law to provide it on

25 a gross basis, consolidated basis, not on an
3223
1 individual brand basis as we have done.
2 Q And Congress passed that law, didn't they?
3 A I'm not familiar with the law precisely. I
4 assume there is a law, yes.
5 Q And the law tells the companies how to
6 report that information to the Department of
7 Health and Human Services, doesn't it?
8 A Yes.
9 Q And it also requires the Department of
10 Health and Human Services to issue a report
11 if they see anything on that list that
12 causes them any concern, doesn't it?
13 A I'm not familiar with the law, the details
14 of the law.
15 Q Are you familiar with the fact that no such
16 report has ever been issued by the
17 Department of Health and Human Services?
18 A I have no direct knowledge.
19 Q Now, am I correct, Mr. LeBow, that Liggett
20 currently makes and sells cigarettes where
21 these warnings you showed the jury earlier
22 don't appear?
23 A We make them on a contract manufacturing
24 basis, some cigarettes for certain customers
25 who provide their own brands.

3224

1 Q So the answer to the question is yes?
2 A For those customers, yes.
3 Q And am I correct, Mr. LeBow, that -- let me
4 back up. Do you remember Mr. Motley asked
5 you to read a paragraph of from Exhibit
6 20462, or he read a paragraph to you and
7 asked you whether you agreed with it,
8 dealing with safer cigarettes?
9 A I remember vaguely, yes.
10 Q Let me ask you to assume that later in that
11 same document the statement is made that
12 there are a number of approaches that can be
13 used to potentially make tobacco smoke
14 safer, including simplifying the smoke, that
15 is, reduce the total number of chemicals in
16 smoke.
17 Do you know what efforts Liggett or any
18 other cigarette companies have made over the
19 years to reduce the number of chemicals in
20 smoke?
21 A I have no knowledge, I don't know.
22 Q Do you know what the government through the
23 National Cancer Institute, the Tobacco
24 Working Group had said about the efforts
25 cigarette companies have made over the years

3225

1 to reduce the number of chemicals in smoke?
2 A No, I do not know.
3 Q Another suggestion in that same exhibit is
4 made that a second approach would be to
5 dilute the inhaled smoke with air. Do you
6 know what efforts Liggett or any other
7 tobacco company has made over the years to
8 dilute smoke with air in order to reduce the
9 tar and nicotine delivery in cigarettes?

10 A I do not know.
11 Q Do you know whether the National Cancer
12 Institute and Tobacco Working Group has ever
13 commented upon the fact that cigarette
14 companies have diluted inhaled smoke with
15 air?
16 A I don't know.
17 Q Do you know anything about the Tobacco
18 Working Group or the National Cancer
19 Institute?
20 A No, I do not.
21 Q Do you know anything about efforts or do you
22 know anything about what the government had
23 said about the tobacco company efforts to
24 reduce the tar and nicotine delivery of
25 cigarette smoke over the years?

3226

1 A No, I don't know exactly.
2 Q And the fact is that during the entire
3 period that you have owned the Liggett Group
4 or owned Brooke Group, which in turn has
5 owned part of the Liggett Group, there have
6 been warnings on cigarette packages required
7 by law in this country; right?
8 A Yes, but not smoking is addictive warning.
9 Q And do you know whether those warnings -- do
10 you know whether warnings appear by law in
11 Canada on cigarette packages?
12 A I don't know for sure, but I just saw one
13 today.
14 Q And am I correct that during the entire time
15 period you've been at Liggett, you've never
16 reviewed any research that has been
17 conducted by or funded by Liggett?
18 A No, but my lawyers did after I changed
19 lawyers.
20 Q And during the entire period that you've
21 been associated with Liggett, you've never
22 asked for a list of research that Liggett
23 has conducted for your review?
24 A That's correct.
25 Q And you've never even stepped foot in the

3227

1 research department at Liggett and Myers
2 during all the years you've owned Liggett?
3 A That's correct.
4 Q In fact, I think you've walked by the door
5 but never even stuck your head in the door.
6 A I don't recall exactly.
7 Q You've never met with any scientists at
8 Liggett during the time period you've owned
9 the Liggett Group?
10 A That's correct.
11 Q You can't even tell me the name of a single
12 scientist who has been employed at Liggett
13 over the entire period you've owned the
14 company?
15 A That's correct.
16 Q You've never talked with Liggett scientists
17 about whether cigarette smoking is
18 addictive?
19 A No, but again, I have my attorneys review
20 all the Liggett documents and other

21 documents and advise me.
22 Q How do you define the word "addictive,"
23 Mr. LeBow?
24 A I define it as someone who has a heck of a
25 time stopping smoking, as per my wife who
3228
1 just can't stop, for example.
2 Q Do you know if that's the way the Surgeon
3 General defines addiction?
4 A I'm not a scientist. I don't know how the
5 Surgeon General defines addiction.
6 Q Do you know if that's the way the National
7 Institute of Drug Abuse defines addiction?
8 A No, I do not.
9 Q Do you know if that's the way any scientist
10 at Liggett do or have ever defined the word
11 "addiction"?
12 A No, I do not.
13 Q Have you ever talked with any scientists at
14 Liggett about whether cigarettes could be
15 made safer or could be made less hazardous?
16 A No. We don't have any scientists. During
17 my tenure, we didn't have any research
18 people working on this.
19 Q During the time period you've owned the
20 Liggett Group, you haven't hired any
21 research people to work on smoking and
22 health issues?
23 A Again, we have under two percent of the
24 market and couldn't afford to do that.
25 Q Have you ever asked anyone while you owned
3229
1 Liggett to invest any resources in
2 developing technology to produce a less
3 hazardous cigarette?
4 A The only thing I've done, I've had some of
5 my people talk to some other people who
6 claim to have some better cigarettes;
7 preliminary discussions only, though.
8 Q Have you ever asked anyone at Liggett to
9 invest or to conduct any research on less
10 hazardous or safer cigarettes?
11 A I said we don't have any research people
12 capable of doing that.
13 Q Do you know whether Liggett makes low tar or
14 low nicotine cigarettes?
15 A I don't know.
16 Q Who runs the Liggett Group?
17 A Individual by the name of Ron Fulford.
18 Q Now, essentially do you own it?
19 A No. I own, as I said, 50 percent of Brooke
20 Group which owns 100 percent of BGLS which
21 then owns 100 percent of Liggett.
22 Q So you own 50 percent of --
23 A 50 percent of this.
24 Q Of the company that owns 100 percent of
25 this?
3230
1 A Right.
2 Q That owns 100 percent of this?
3 A Correct.
4 Q And just because you own half of this
5 company doesn't mean you run that company;

6 right?
7 A That's correct.
8 Q Do you know whether Liggett makes cigarettes
9 that have more or less tar and nicotine than
10 other companies?
11 A I don't know.
12 Q Do you know whether Liggett has ever
13 contributed any money to the Council for
14 Tobacco Research while you've been
15 associated with Liggett?
16 A I don't believe they have while I've been
17 there.
18 Q Do you know how many times the Surgeon
19 General of the United States has cited or
20 referred to research sponsored by the
21 Council for Tobacco Research in the Surgeon
22 General reports that are published each
23 year?
24 A No, I don't know.
25 Q And isn't it a fact, Mr. LeBow, that during

3231

1 the entire time that you've been associated
2 with the Brooke Group, Liggett hasn't made
3 any contributions or given any money to
4 people outside the company to study the
5 issue related to mainstream smoking and
6 health, at universities or laboratories and
7 other places?

8 A Not to my knowledge.
9 Q At some point in 1997, isn't it a fact that
10 you more or less put your stake in the
11 Brooke Group up for sale?

12 A No.
13 Q Do you recall -- I'm sorry. Well, do you
14 recall in February of 1997 filing an
15 amendment to your 1991 prospectus which
16 stated that you intended to offer for sale
17 56 percent of the Brooke Group?

18 A No. We filed an amendment merely to
19 register stock, not to sell it.

20 Q You're not trying to sell the Brooke Group?

21 A Absolutely not.

22 Q And you're still selling cigarettes?

23 A Yes.

24 Q And you don't have any intention of not
25 selling cigarettes?

3232

1 A That's correct.
2 MR. OHLEMEYER: All right. That's
3 all I have, Your Honor, thank you.

4 THE COURT: Mr. Wagner, will you
5 have cross-examination?

6 MR. WAGNER: Just a couple, Your
7 Honor.

8 THE COURT: All right.

9 CROSS EXAMINATION

10 BY MR. WAGNER:

11 Q Now, Mr. LeBow, this isn't the first time
12 you've ever come into a courtroom and given
13 the kind of testimony that you just gave to
14 this jury, is it?

15 A In the secondhand smoke area, yeah, that's
16 correct, I've come before.

17 Q I mean, you've been in courtrooms and
18 testified substantially the same as you have
19 here today; right?
20 A Correct.
21 Q And how long have you known Mr. Motley?
22 A I met Mr. Motley maybe a year ago during the
23 course of negotiating a settlement
24 agreement.
25 Q The question was, how long have you known

3233

1 Mr. Motley?
2 A I met him about a year ago, I believe.
3 Q So you met him about a year ago, and
4 Mr. Motley asked you to come up here. You
5 live in where, [DELETED]?
6 A Yes.
7 Q And he asked you to come up here and
8 testify, didn't he?
9 A Yes, he did.
10 Q And you agreed to do that, didn't you?
11 A Yes, through my attorneys, that's correct.
12 He didn't ask me directly. He asked my
13 attorney.
14 Q Pardon me?
15 A He communicated with my attorney, not with
16 me.
17 Q All right. Now, you personally testified
18 that you don't believe that cigarettes are
19 addictive; isn't that true?
20 A On advice of what my attorneys were telling
21 me at the time.
22 Q The question is, you have personally
23 testified that you do not believe that
24 cigarettes are addictive. It's a yes or no
25 answer?

3234

1 A Yes. In 1993, yes.
2 Q And you were asked at that time, do you
3 believe whether tobacco is addictive, and
4 you said you do not. You were asked whether
5 you had read a single article on the subject
6 and you said no. Correct?
7 A Correct.
8 Q Now, you aren't a scientist; you weren't a
9 scientist then; right?
10 A Correct.
11 Q You're not a scientist now; correct?
12 A That's correct.
13 Q And you were telling the truth in 1993 as
14 you believed it, isn't that so?
15 A As I believed it and the information given
16 to me, yes.
17 Q And how does the term "addiction" differ
18 with dependency?
19 A I don't know exactly.
20 Q How does the term "addiction" differ from
21 habit?
22 A I would think a habit is easier to get rid
23 of than an addiction.
24 Q Do you remember giving this answer to this
25 question when your deposition was taken in

3235

1 the Broin case.

2 "How does the term addiction differ
3 from habit?"
4 And you answered, "I have no idea."
5 A But now I'm just saying my opinion today is
6 I would believe no more about addiction
7 today than I knew four or five years ago,
8 that I would believe addiction much more
9 difficult to get rid of than habit.
10 Q Do you remember in that same deposition you
11 were asked, "You were not drawing a
12 distinction necessarily between addiction,
13 dependency, and habit because you don't know
14 the distinctions between those words; isn't
15 that correct?"
16 And you answered, "No, I don't know the
17 legal or scientific definitions of those
18 three."
19 Do you remember those questions and
20 answers?
21 A Yes, I do.
22 Q And they were true when you testified in
23 that deposition; is that so?
24 A Yes. But this is not -- I wasn't giving my
25 scientific opinion just now. I was giving

3236

1 my personal opinion.
2 Q Because you're not a scientist?
3 A I'm not a scientist, that's correct.
4 Q And you're not a medical doctor?
5 A I'm not a medical doctor.
6 Q So you don't have any basis to agree or
7 disagree about any of those things
8 Mr. Motley asked you about; isn't that true,
9 sir?
10 A No, that's not true.
11 MR. WAGNER: That's all I have,
12 Your Honor.
13 THE COURT: Will there be redirect,
14 Mr. Motley?
15 MR. MARKS: Aaron Marks for
16 Liggett. I just have one quick question.
17 THE COURT: Identify yourself.
18 MR. MARKS: Mr. LeBow, Aaron Marks,
19 I'm your attorney.
20 THE WITNESS: Yes.

21 CROSS EXAMINATION
22 BY MR. MARKS:

23 Q Mr. LeBow, there are three companies that
24 you're familiar with that are defendants in
25 this case, two of which you've talked about

3237

1 already. One is the Brooke Group. Does
2 Brooke Group manufacture or sell cigarettes?
3 A No.
4 Q The other one is the Liggett Group. Now,
5 Liggett Group manufactures and sells
6 cigarettes?
7 A Correct.
8 Q The third entity is a company called Liggett
9 & Myers, Inc. Do you know how Liggett &
10 Myers, Inc. is related to either the Liggett
11 Group or the Brooke Group?
12 A I believe it's 100 percent owned by Liggett

13 Group.
14 Q And does Liggett & Myers, Inc. manufacture
15 or sell cigarettes?
16 A No, I think the cigarettes right now are
17 manufactured through the Liggett Group.
18 MR. MARKS: That's all I have.
19 Thank you.
20 THE COURT: Do you anticipate any
21 redirect?
22 MR. MOTLEY: About ten minutes,
23 Your Honor.
24 THE COURT: I'm going to break now.
25 They tell me the hot food has been delivered

3238

1 for the jury. I think we'll let --
2 MR. MOTLEY: Maybe I can reduce it
3 to two minutes in that case. I'm just
4 teasing.
5 THE COURT: We'll start again at
6 1:15 ladies and gentlemen. We'll take the
7 noon break.
8 (Standard admonition)
9 THE COURT: Sir, you may step down.
10 MR. CASSELL: All rise.
11 (A lunch recess was taken.)
12 MR. CASTLE: All rise.
13 (Jury present)
14 THE COURT: Be seated. We're back
15 on the record. Jury reappears together with
16 the alternates. Mr. LeBow.
17 Would you again tell the jury your
18 name, sir.
19 THE WITNESS: Bennett LeBow.
20 THE COURT: You recognize you're
21 still under oath?
22 THE WITNESS: Yes, sir.
23 THE COURT: All right.
24 Mr. Motley, redirect.
25 MR. MOTLEY: Thank you, Your Honor.

3239

1 REDIRECT EXAMINATION
2 BY MR. MOTLEY:
3 Q Mr. LeBow, forgive me for my failing voice.
4 Mr. LeBow, you're not an expert, are you, on
5 the Indiana law, when Brooke or somebody
6 else has to pay for what a subsidiary does,
7 are you?
8 A No, I'm not.
9 Q Now, since you decided that you could put a
10 warning about addiction on the Liggett pack,
11 are you aware that Philip Morris puts an
12 additional warning on their packs of
13 cigarettes?
14 MR. MOTLEY: May I approach, Your
15 Honor?
16 THE COURT: Go ahead.
17 Q You see the Surgeon General's warning, then
18 you see something else up at the top?
19 A Yes.
20 Q What does it say up at the top?
21 A Underage sale prohibited.
22 Q So, Mr. LeBow, there's nothing that prevents
23 you from putting a warning label on it about

24 environmental tobacco smoke, and there's
25 nothing to prevent you from putting a
3240
1 warning label on about addiction, and
2 there's nothing to keep Philip Morris from
3 putting a warning label on about selling to
4 kids; right?
5 A Yes.
6 MR. OHLEMEYER: Argumentative, Your
7 Honor.
8 THE COURT: Overruled.
9 Q Is that correct?
10 A That's correct.
11 MR. MOTLEY: Your Honor, we move
12 this pack of Marlboro in as the next number.
13 THE COURT: Any objection,
14 Mr. Ohlemeyer?
15 MR. OHLEMEYER: No, Your Honor.
16 MR. MOTLEY: This is an open one.
17 There's nothing in there.
18 THE COURT: Plaintiffs' 33 will be
19 admitted.
20 (Plaintiffs' Exhibit(s) 33 received in
21 evidence.)
22 MR. MOTLEY: May I pass it to the
23 jury?
24 THE COURT: Go ahead.
25 Q Mr. LeBow, you don't, as you sit here today,
3241
1 you don't know what RJ Reynolds Nabisco does
2 or doesn't do to control RJ Reynolds Tobacco
3 Company decisions about what to say or what
4 not to say, do you?
5 A No, I do not know.
6 Q Same question about BAT Industries and Brown
7 & Williamson, do you?
8 A No, I do not know.
9 Q Now, you were asked questions about legal
10 contingencies. Do you remember that?
11 A Yes.
12 Q When you purchased Liggett, after -- when
13 you first had conversations with your
14 attorneys about these lawsuits and they told
15 you not to worry, you remember you told us
16 that?
17 A That's correct.
18 Q Did they tell you that in every case they
19 claimed that the person didn't die of lung
20 cancer?
21 MR. OHLEMEYER: Objection, Your
22 Honor. This is argumentative and has no
23 relevance to this lawsuit.
24 MR. WAGNER: It's also outside the
25 scope of proper redirect, Your Honor. And
3242
1 it's hearsay.
2 THE COURT: I think it may be
3 outside the scope.
4 MR. MOTLEY: Your Honor, if I may
5 address that. They asked him about legal
6 contingencies and what the lawyers told him
7 and what he reported to the SEC. I think
8 I'm entitled to ask him why he wasn't

9 worried about it if they told him what
10 defenses they raised.
11 THE COURT: You're right. They
12 did. The objection is overruled. Go ahead.
13 Q Didn't they tell you, sir, that in every
14 lung cancer case the cigarette companies
15 claimed it was something other than lung
16 cancer?
17 A They told me it was not proven that lung
18 cancer caused these problems, or smoking and
19 lung cancer -- caused lung cancer, I should
20 say.
21 Q Now, you were asked about reducing chemicals
22 and dilution of smoke. Do you remember
23 that?
24 A Yes.
25 Q They asked you about that?

3243

1 A Yes.
2 Q Do you know, Mr. LeBow, have you learned
3 since 1995 that the number of cases of
4 disease in American citizens is increasing
5 rather than decreasing?
6 MR. OHLEMEYER: Objection, Your
7 Honor.
8 THE COURT: Sustained.
9 Q You were asked a number of questions about
10 what the government said. Do you remember
11 that?
12 A Yes.
13 Q About what the government, the Surgeon
14 General said about this and some working
15 group said about that. Do you recall those?
16 A Yes, I do.
17 MR. MOTLEY: Your Honor, we move
18 into admission at this time Plaintiffs'
19 Exhibit 50182. Under Rule 801-8, you
20 admitted the other Surgeon General Reports.
21 We move this. This is the Findings of Fact
22 of the Food and Drug Administration.
23 MR. OHLEMEYER: Your Honor, we
24 object to it as being beyond the scope of
25 this witness' testimony and --

3244

1 THE COURT: Is there a question
2 about the genuineness of that document?
3 MR. OHLEMEYER: No. It deals with
4 relevance to this lawsuit and its
5 foundation.
6 (Bench discussion)
7 THE COURT: 50182 is withdrawn.
8 MR. MOTLEY: At this time.
9 THE COURT: At this time.
10 Q You told us, you told counsel on
11 cross-examination that your attorneys,
12 Mr. Kasowitz and Mr. Marks and others --
13 Mr. Marks is here; he practices with
14 Kasowitz, doesn't he?
15 A That's correct.
16 Q That your companies examined your documents
17 and advised you of matters contained
18 therein. Do you recall saying that?
19 A That's correct.

20 Q What did they tell you, sir?
21 MR. WAGNER: Objection hearsay.
22 MR. MOTLEY: Not what the lawyers
23 told him.
24 MR. WAGNER: This is also again
25 outside the scope of redirect, proper

3245

1 redirect.
2 MR. MOTLEY: They asked him.
3 THE COURT: Overruled. You may
4 answer.
5 Q What did the lawyers tell you about what the
6 documents revealed, sir?
7 A They told me they were getting the documents
8 from the old law firms and spending six
9 months reviewing them, that there were
10 serious problems in these documents, that
11 they contained issues of smoking being
12 addictive, smoking causing all these health
13 problems and some real issues of crime and
14 fraud in these documents.
15 MR. MOTLEY: No further questions,
16 Your Honor.

17 THE COURT: Mr. Ohlemeyer.

18 RE CROSS-EXAMINATION

19 BY MR. OHLEMEYER:

20 Q I'm a little confused, Mr. LeBow. Your
21 company owns a company who is a defendant in
22 this lawsuit; right?
23 A Correct.
24 Q That's the Liggett Group. Tell us what your
25 understanding of what a defendant in the

3246

1 lawsuit means.
2 A The defendant is someone who is accused of
3 doing something wrong, I suspect, in this
4 case.
5 Q And you hired a lawyer to defend your
6 company in this lawsuit?
7 A That's correct.
8 Q Presumably he sends you a bill every now and
9 then?
10 A Yes, he does, unfortunately.
11 Q And your company is contesting the claim
12 being made in this lawsuit, isn't it?
13 A That's correct.
14 Q Now, Mr. LeBow, who is in a better position
15 to decide what might or might not have
16 caused Mrs. Wiley's cancer in this case?
17 You or the jury?
18 A The jury, after hearing all the facts.
19 MR. OHLEMEYER: That's all I have,
20 Your Honor.
21 MR. MOTLEY: No further questions,
22 Your Honor.
23 THE COURT: Mr. Wagner, any other
24 questions?
25 MR. OHLEMEYER: I do have one

3247

1 other, Your Honor. May I?
2 THE COURT: Go ahead.
3 RE CROSS-EXAMINATION (cont.)
4 BY MR. OHLEMEYER:

5 Q With respect to that package of Philip
6 Morris cigarettes, the statement you read,
7 underage sale prohibited?
8 A Yes.
9 Q Is that a statement of fact?
10 A I have no idea.
11 Q You don't know whether it's against the law
12 to sell cigarettes to minors?
13 A That wasn't your question.
14 Q Well, my question, sir, is underage sale
15 prohibited, is that a statement of fact?
16 A That's correct.
17 Q All right. Is it a statement of law?
18 A Yes.
19 Q Do you know whether that is a warning as
20 defined by the Congress in the Cigarette
21 Labeling and Advertising Act?
22 A I don't believe it is.
23 MR. OHLEMEYER: Thank you, Your
24 Honor.
25 THE COURT: Mr. Wagner?

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1 RE CROSS EXAMINATION
2 BY MR. WAGNER:
3 Q What did you do over the lunch hour,
4 Mr. LeBow?
5 A I had lunch.
6 Q Who did you have lunch with?
7 A My attorney.
8 Q Who else was with you?
9 A No one.
10 Q Did you discuss your testimony over the
11 lunch hour with Mr. Motley?
12 A No, absolutely not.
13 Q Did you discuss your testimony over the noon
14 hour with anybody from Mr. Motley's law firm
15 or any of these plaintiffs' lawyers?
16 A Absolutely not.
17 MR. WAGNER: That's all I have,
18 Judge.
19 THE COURT: Mr. Marks?
20 MR. MARKS: No questions, Your
21 Honor.
22 MR. MOTLEY: One question.
23 What did you have for lunch? Just
24 kidding.
25 THE COURT: Sir, thank you very

3249

1 much for coming up from Florida.
2 THE WITNESS: Thank you.
3 THE COURT: Call your next.
4 MR. MOTLEY: Your Honor, may I have
5 a moment? Let me see what they decided.
6 THE COURT: All right.
7 MR. MOTLEY: Your Honor, we're
8 going to show the jury, with the Court's
9 permission, the transcript video of
10 Mr. Stephen Goldstone, the chairman of RJR
11 Nabisco, pursuant to Your Honor's rulings of
12 Friday.
13 THE COURT: All right. That's been
14 marked, Counselor? It has not been marked
15 yet, the videotape.

16 It will be Plaintiffs' Exhibit 34, and
17 it's offered now, Counselor?

18 MR. MOTLEY: Yes, Your Honor.

19 THE COURT: All right. It's been
20 previously discussed, the Court's ruled.
21 The Court does rule it admissible into
22 evidence in this matter. How long will that
23 take, do you know, Counselor?

24 MR. MOTLEY: I think, Your Honor,
25 with your rulings, it takes less than 15

3250

1 minutes.

2 THE COURT: All right.

3 MR. SHOCKLEY: Judge, there needs
4 to be a limiting instruction.

5 MR. MOTLEY: We're offering it
6 against everybody.

7 MR. SHOCKLEY: Well, that's
8 incorrect. May we approach the bench?

9 THE COURT: Yes.

10 (Bench discussion)

11 THE COURT: Plaintiffs' Exhibit 34
12 will be admitted over the objection. The
13 objection is overruled.

14 (Plaintiffs' Exhibit(s) 34 received in
15 evidence.)

16 THE COURT: The testimony you will
17 hear next, ladies and gentlemen, is
18 testimony that was given in another
19 proceeding and prior to the trial of this
20 case. Although this witness is not
21 presently in this court, you are to give
22 this testimony the same weight as if the
23 witness were here and testifying live in
24 court.

25 The testimony of this witness, Stephen
3251

1 Goldstone, is offered by the plaintiff
2 against RJR Nabisco Holdings Corporation,
3 and RJ Reynolds Tobacco Company. You should
4 not consider the testimony as to any other
5 defendant. But you may consider it and
6 whatever weight it may have as to RJR
7 Nabisco Holdings Corporation and RJ Reynolds
8 Tobacco Company.

9 You may publish.

10 MR. MOTLEY: Your Honor, we're
11 going to show it by videotape.

12 THE COURT: All right.

13 (Deposition by videotape.)

14 Q You are a lawyer?

15 A I am a lawyer.

16 Q And where did you go to law school, sir?

17 A NYU.

18 Q And when did you graduate?

19 A 1970.

20 Q And you joined RJR Nabisco or any of its
21 entities in what year?

22 A 1995.

23 Q What is your current position, sir?

24 A I'm chairman and chief executive officer of
25 RJR Nabisco.

3252

1 Q In 1997, Mr. Goldstone, is that statement
2 still true, that Reynolds believes the
3 products we make are not injurious to
4 health?
5 A I don't -- I don't think Reynolds could make
6 that statement today.
7 Q Mr. Goldstone, you just told me that
8 Reynolds could not make the statement that
9 we believe the products we make are not
10 injurious to health; is that correct?
11 A I think they could not make that statement
12 today.
13 Q Mr. Goldstone, you've been quoted in
14 newspapers as saying that under your
15 stewardship, you intend to make Reynolds, to
16 instill a new sense of corporate culture in
17 Reynolds. Do you recall making that
18 statement?
19 A I actually --
20 Q Well, is it true?
21 A Mr. Motley, I think that managers today at
22 Reynolds understand that that company has to
23 accept responsibility and conduct itself in
24 a responsible manner, and to that extent I'm
25 satisfied that they are doing that today.

3253

1 Q Mr. Goldstone, do you agree that in the past
2 Reynolds' managers, not under your helm,
3 have made mistakes that have impacted
4 adversely on public health?
5 A I can't say that, Mr. Motley. You know, the
6 only thing -- I know we're going to go
7 through a lot of this, but in fairness to
8 me, really, I've been in this company a year
9 and a half, I know there are lawsuits
10 surrounding the conduct of this company, I
11 talked to my lawyers about it a lot, I
12 understand there are raging debates in these
13 cases, including this one you have in
14 Florida, but I -- I don't have judgments to
15 make. I'm not interested in the past.
16 That's something for you and the judges and
17 the juries to figure out. For me, it's
18 going forward in the future and how we
19 conduct ourselves in the future.
20 Q Well, if you're going to conduct yourself
21 differently in the future, then, obviously,
22 you're going to make some changes; correct?
23 A What I said to you is that we're going to
24 conduct ourselves responsibly. I'd like to
25 think our company conducted itself

3254

1 responsibly in all circumstances in the
2 past, but that is what the subject of this
3 litigation of Florida is all about.
4 Q Well, did you -- you've made some
5 statements, though, in the public, in the
6 media, about Reynolds' conduct in the past.
7 A I don't think so.
8 Q Are you proud of the conduct of Ed Jacobs in
9 his representation of Reynolds in the past,
10 however you acquired the information?
11 A I don't think I can say that, proud is --

12 pride is not a feeling that comes to mind
13 under those circumstances.
14 Q Well, Mr. Goldstone, in your legal career,
15 you've never advised a client to destroy
16 documents that relate to public health, have
17 you?
18 A I have not.
19 Q And you wouldn't think that was appropriate,
20 would you?
21 A I would not. Ordinarily, if I heard that,
22 I'd be very troubled by it.
23 Q Would it be your goal, as chief executive of
24 Reynolds, to try to market, to develop and
25 market a product that will not be the cause

3255

1 of serious ailments?
2 A That would be definitely a goal of this
3 company, to do that.
4 Q That document is 44 years old. But wouldn't
5 you agree, sir, that that's a fairly sound
6 piece of advice, even today, in 1997, that
7 an industry faced with an accusation that a
8 product causes disease should place the
9 public health above earnings?
10 A I think that if we're talking about the
11 tobacco industry, which I think is what
12 you're talking about.
13 Q Yes, sir.
14 A I think that industry has to be sensitive to
15 these public health concerns. It sells a
16 product that uniquely is considered to cause
17 problems in public health. It has to be
18 sensitive to that. So --
19 Q So to place the public health, when you have
20 an issue of cancer and other disabling and
21 deadly diseases, above earnings; correct?
22 A I think what they're talking about here is
23 not so much placing public health, it's --
24 it's twisting research and medical science.
25 That I think would be unforgiven.

3256

1 Q And don't you know, Mr. Goldstone, from
2 your -- again, understanding you've only
3 been with this company recently, that there
4 are serious allegations being made that your
5 predecessors at Reynolds and other
6 companies, indeed, did -- there are
7 allegations -- did attempt to twist medical
8 research at the expense of public health?
9 A The only -- Mr. Motley, remember now, I'm
10 Chairman of the Board of RJR Nabisco.
11 Q Yes, sir.
12 A There is a chief executive, I think you've
13 taken his deposition, of Reynolds.
14 Q Who is that?
15 A Andy Shindler.
16 Q No, I haven't.
17 A Somebody did.
18 Q Don't accuse me of being him.
19 A And I don't mean to be overly technical, but
20 I just want you to know --
21 Q I understand.
22 A -- my predecessors did not work in the

23 tobacco business.

24 Q I understand. You understand the question?

25 A Yeah. The allegations -- let's not kid

3257

1 ourselves -- the allegations, what your
2 point is, you're making allegations about
3 twisting medical research and that there are
4 serious allegations about predecessors in
5 the tobacco business. You bet there are.

6 Q I want to ask you another question. If
7 Mr. Shindler came to you and told you that
8 scientists at Reynolds had concluded that
9 the evidence was sound and solid that
10 cigarettes caused lung cancer, would you
11 advise, owning 100 percent of the shares of
12 that company, that Mr. Shindler close down
13 the factory, stop making those cigarettes,
14 until you could find out how to get rid of
15 the thing in the cigarettes that caused
16 cancer?

17 A Well, it's a -- it's a complicated question
18 for me, and I hope you'll give me a
19 second --

20 Q You take all the time you want, sir.

21 A -- to answer that one for you, because for
22 myself, and this is just my own personal
23 opinion, I have been in this world for now
24 51 years. I'm not a scientist, but I do
25 believe that today that cigarette smoking

3258

1 plays a role in causing lung cancer. And
2 I'm in the job I'm in, and I believe that
3 the state of Florida, the government of the
4 state of Florida, I think most people on
5 your side of the table, I believe the
6 President of the United States, and I
7 believe everyone in Congress, and I believe
8 most Americans believe that cigarette
9 smoking causes lung cancer.

10 All the people of Florida, the
11 governor, the president and the Congress,
12 has decided against prohibition. They
13 decided that American adults, with free
14 information and good information, ought to
15 be able to make their own choice.
16 Politically, I personally believe in that.
17 I believe in that very much. I think it's
18 one of the most important principles that we
19 have in this country.

20 But if Mr. Shindler, if it became a
21 revelation for him, and he decided he
22 shouldn't participate in the business
23 anymore, I could understand that completely.
24 But I -- I, for me, today, sitting here, if
25 a scientist could connect the scientific

3259

1 gaps, fill in the scientific gaps, that
2 would not be a revelation to me that
3 cigarette smoking somehow was found to cause
4 cancer. That's not a shock to me. I don't
5 think it's a shock to almost any American
6 today. So that's where I am on that.

7 I will tell you this. I was watching

8 on CNN this morning, and I saw one of the
9 universities, one of the scientists thought
10 that they had discovered what it was, the
11 mechanism that caused from smoking and lung
12 cancer. Lord knows I hope they do. And if
13 they do, these tobacco companies damn well
14 better work like lunatics to figure out how
15 to improve their products.

16 It would be great for all Americans to
17 understand cancer more, and I think it would
18 be important for this industry to do that.
19 And the other thing, Mr. Motley, I add is,
20 this time, this industry, will work
21 hand-in-hand with the government and will
22 work cooperatively in terms of medical
23 research. But denying basic truths, medical
24 truths, is not what -- at least not what RJ
25 Reynolds Tobacco Company will do.

3260

1 Q I take it, then, sir, you do accept that
2 cigarette smoking is a cause of disease in
3 humans.

4 A I -- I will tell you, because I'm not a
5 scientist, and I respect the views of our
6 scientists in our country who have very
7 compellingly explained to me why there are
8 gaps in scientific knowledge. But I've only
9 been in this company a couple of years. I
10 was a smoker myself at one time, and I have
11 always believed, rightly or wrongly, I have
12 always believed that smoking plays a role in
13 causing lung cancer. What that role is, I
14 have no idea, but I do believe that.

15 Q So your answer to my question is yes?

16 A Yes, sir.

17 Q Mr. Goldstone, in your prior answer, you
18 mentioned the word adults have the freedom
19 of choice, which is a cherished right in our
20 country. But I would ask you, sir, do you
21 believe a corollary of freedom of choice is
22 full disclosure, so you have all the cards
23 on the table in order to exercise choice?

24 A I think the cards have to be on the table to
25 exercise free choice.

3261

1 Q And have you ever known anyone who was
2 addicted to anything; a slave to a
3 substance?

4 A I don't think I have.

5 Q Would you accept that addiction, true
6 addiction, of a person to a substance robs
7 that person of an ability to exercise free
8 will and free choice? I'm not talking about
9 cigarettes now.

10 A No. I know that. I know that. I -- I
11 think the way we define addiction today
12 colloquially, I don't think that's
13 necessarily true. I think a traditional
14 definition, it would be true, yes.

15 Q So a person that has to have a substance --

16 A Uh-huh.

17 Q -- to get by, whatever you call it, addicted
18 to it, that that, that burning desire robs

19 that person of true choice?
20 A You heard it under the orthodox medical
21 definitions that used to exist, I think
22 that's true.
23 Q Okay. Has Reynolds, under your stewardship,
24 adopted a position of warning people in
25 Third World countries about cigarettes and

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1 their potential hazards?
2 A Reynolds, as I understand it, has a policy
3 of putting warnings as they -- different
4 warnings are required in different
5 countries, and we have warnings as they are
6 required in each country.
7 Q But if a country doesn't require a warning,
8 Mr. Goldstone, would it be your intention in
9 the future to let those people have the
10 benefit of the knowledge that smoking
11 carries risks to human health in the future?

12 A Yes, sir.

13 MR. MOTLEY: That concludes the
14 deposition, Your Honor.

15 THE COURT: Thank you. Call your
16 next.

17 MR. WESTBROOK: Your Honor, Ed
18 Westbrook, again for the plaintiffs. Your
19 Honor, at this time we would like to call
20 the former Surgeon General of the United
21 States, Dr. Julius Richmond, to the stand.

22 THE COURT: All right, Counselor.
23 Good afternoon, sir.

24 THE WITNESS: Good afternoon.

25 THE COURT: Would you raise your
3263

1 right hand, please.

2 PLAINTIFFS' WITNESS, JULIUS RICHMOND, SWORN

3 THE COURT: Would you have a seat,
4 please.

5 THE WITNESS: Surely.

6 THE COURT: Would you tell this
7 jury your name.

8 THE WITNESS: I'm Julius B.
9 Richmond.

10 THE COURT: And would you spell
11 your last name.

12 THE WITNESS: R-I-C-H-M-O-N-D.

13 THE COURT: Thank you, sir.

14 MR. WESTBROOK: Your Honor, may I
15 approach, give the doctor some water?

16 THE COURT: Sure.

17 THE WITNESS: Thank you.

18 DIRECT EXAMINATION

19 BY MR. WESTBROOK:

20 Q Good afternoon.

21 A Good afternoon.

22 Q Where do you live, sir?

23 A I live in [DELETED].

24 Q Dr. Richmond, how old are you?

25 A I'm 81.

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1 Q And are you a medical doctor, sir?

2 A Yes, I am.

3 Q And for how long have you been a medical

4 doctor?
5 A 59 years.
6 Q And were you once the Surgeon General of the
7 United States, sir?
8 A Yes, I was.
9 Q And during what years?
10 A From 1977 to 1981.
11 Q Dr. Richmond, have you ever testified in a
12 court of law before a jury like this on
13 matters involving cigarettes and health?
14 A On only one occasion.
15 Q Dr. Richmond, where did you go to medical
16 school?
17 A University of Illinois.
18 Q And when did you graduate, sir?
19 A In 1939.
20 Q Did you serve an internship after your
21 medical school training?
22 A Yes.
23 Q And where was that?
24 A At the Cook County Hospital in Chicago.
25 Q And during what years were you serving your

3265

1 internship?
2 A I served from 1939 to 1941.
3 Q Did World War II interrupt your civilian
4 medical career, sir?
5 A Yes, it did. I was in my residency training
6 in pediatrics at the Cook County Hospital at
7 the time, and I interrupted that training to
8 enter service.
9 Q Okay. And did you serve as a physician in
10 the armed forces during World War II?
11 A Yes, I served as a flight surgeon in the Air
12 Forces.
13 Q And what were your duties as a flight
14 surgeon?
15 A My duties were essentially to help in the
16 selection of air crews. These were pilots,
17 navigators, bombardiers, and to supervise
18 the health of their crews, and to treat
19 them, if they had illness. I also
20 participated in the teaching of aviation
21 physiology to their crews.
22 Q During World War II, Dr. Richmond, while you
23 were in the service, did servicemen receive
24 free cigarettes in their rations?

MR. OHLEMEYER: Objection, Your

3266

1 Honor. Relevance.
2 THE COURT: Overruled. You may
3 answer.
4 A Yes, that was general information. They did
5 have free cigarettes with their rations.
6 Q Did you observe your fellow servicemen
7 smoking?
8 A Yes. Smoking was quite common and smoke --
9 cigarettes were less costly on the military
10 bases.
11 Q Dr. Richmond, after World War II, did you
12 return to your civilian medical practice?
13 A Yes, I completed my residency training in
14 pediatrics.

15 Q And following your residency training, where
16 did you go next?
17 A I joined the faculty of the University of
18 Illinois Medical College in Chicago.
19 Q And for how long did you stay at the
20 University of Chicago Medical College?
21 A University of Illinois.
22 Q Yes.
23 A College of Medicine in Chicago. I stayed
24 there until 1953.
25 Q All right. And did you change institutions

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1 at that time?
2 A Yes. I moved to the State University of New
3 York in Syracuse, New York.
4 Q And did you join the faculty of that medical
5 school?
6 A Yes. I was the Professor and Chairman of
7 the Department of Pediatrics.
8 Q Did you eventually rise to become Dean of
9 the Medical School at the State University
10 of New York?
11 A Yes, I did.
12 Q All right. And how long did you stay at the
13 State University of New York?
14 A I stayed there until 1971 with the exception
15 of a two-year period in federal service.
16 Q Now, you mentioned that you were in the
17 Department of Pediatrics. Tell the jury
18 briefly, what is pediatrics.
19 A Well, pediatrics is the health profession
20 that deals with the prevention of disease in
21 children and the diagnosis and treatment of
22 disease in children. I think it is the
23 specialty that is the clinical specialty
24 that is most oriented toward health
25 promotion and disease prevention.

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1 Q And are you board certified in pediatrics?
2 A Yes.
3 Q To become board certified, did you have to
4 pass an examination?
5 A Yes, there is a board examination.
6 Q Now, you mentioned, Dr. Richmond, that you
7 had a period where you had your service
8 interrupted at the State University of New
9 York. Did you leave the State University of
10 New York for several years to engage in
11 public service?
12 A Yes, I did.
13 Q And what position were you called to?
14 A I was called to the position to be the first
15 director of the Head Start Program as part
16 of the war on poverty which was initiated in
17 1964.
18 Q Was it the President of the United States
19 who called you to be first director of Head
20 Start?
21 A Yes, President Johnson was the president at
22 the time, and he was the one who asked me to
23 perform that service.
24 Q And did you get the Head Start program off
25 the ground, so to speak?

1 A Yes. We did develop the Head Start program
2 as a national program for preschool
3 children, children three to five years of
4 age, who were living in environments of
5 poverty. The program was what we called a
6 Comprehensive Child Development Program. We
7 called it comprehensive because it brought
8 together all of the health programs that
9 children need, physical examination,
10 diagnosis of illness, if there was any, and
11 its treatment. Nutritional program was part
12 of it, dental program, early childhood
13 education, social services. Volunteers were
14 very much a part of the program.

15 And one of its major characteristics
16 was, and remains to this day, is that it is
17 a locally controlled program. It's a
18 program at which the federal funds go to
19 local communities and local boards in those
20 communities to administer the funds,
21 organize the program.

22 The only basic requirements are that
23 the program must be comprehensive and that
24 it must meet acceptable standards.

25 Q All right, Doctor. And after you got the
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1 Head Start program off the ground, did you
2 return to the State University of New York?

3 A Yes, I did.

4 Q Did you subsequently move to another medical
5 school?

6 A Yes, I did. In 1971 I moved to the Harvard
7 Medical School.

8 Q And what appointment did you undertake at
9 the Harvard Medical School?

10 A When I moved to the Harvard Medical School
11 to be the Professor of Child Psychiatry and
12 simultaneously to be the Chief of the
13 Psychiatric Service at the Children's
14 Hospital and Director of the Judge Baker
15 Children's Center in Boston, and shortly
16 after I came to the Harvard Medical School,
17 the dean asked me to serve as the Professor
18 and Chairman of the Department of Preventive
19 and Social Medicine.

20 Q So you became the Chairman of the Department
21 of Preventive and Social Medicine at Harvard
22 Medical School?

23 A That's correct.

24 Q Did you also get an appointment at the
25 Harvard School of Public Health?

1 A Yes. I was asked to accept an appointment
2 as a professor at the Harvard School of
3 Public Health in order to provide better
4 integration between the two schools and the
5 teaching of students in their two schools.

6 Q You mentioned public health, Doctor. What
7 is public health?

8 A Well, public health is the profession that
9 deals with the study of disease in
10 populations and particularly how to prevent

11 disease. It uses the sciences of
12 epidemiology and biostatistics in order to
13 establish the prevalence of disease patterns
14 in populations. And it emphasizes public
15 health practices, particularly oriented
16 toward the early detection of disease, the
17 prevention of disease, and then in more
18 recent decades, because we've learned more
19 about how to promote health and not just to
20 prevent disease, it places a great deal of
21 emphasis on health promotion.

22 Q Doctor, from 1971 to the present, with an
23 interruption for public service that we'll
24 talk about, have you a been a member, a
25 faculty member at the Harvard Medical

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1 School?

2 A That's correct.

3 Q Now, Doctor, does Harvard require all
4 members of the medical faculty at a certain
5 age to take what's called an emeritus
6 status?

7 A Well, they did at the time I became 70, in
8 1988. Subsequently, the federal legislation
9 no longer permits any termination of
10 employment for age, so that I didn't come in
11 under that benefit, so I did become emeritus
12 by University statute.

13 Q All right. And as a member of the Harvard
14 Medical School faculty emeritus, do you
15 still have an office at Harvard?

16 A Yes, I do.

17 Q Do you still lecture to courses at Harvard?

18 A Yes, I participate in teaching programs at
19 various schools at Harvard.

20 Q And during the 27 years, from the time you
21 joined Harvard, in 1971, have you focused on
22 public health issues in your professional
23 career?

24 A Yes. Public health issues have been my
25 predominant concern, with a particular

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1 emphasis on children and adolescent health
2 issues. So I think that that's a continuing
3 thread. And then in more recent years, as
4 health policy issues have become a more
5 prominent national concern, I have focused a
6 lot of my attention on health policy.

7 Q And Doctor, during your tenure at Harvard,
8 again, did the president once again call you
9 to public service of the country?

10 A Yes.

11 Q When was that?

12 A That was in 1977.

13 Q And what position were you called to assume?

14 A I was called to assume two positions, which
15 were presidential appointments, position of
16 Assistant Secretary for Health and Surgeon
17 General of the United States Public Health
18 Service.

19 Q All right. And during what years did you
20 serve as Surgeon General of the United
21 States?

22 A From 1977 to 1981.
23 Q All right. Doctor, I want to come back to
24 your Surgeon General service in just a
25 minute, but first I wanted to ask you about
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1 some of the honors and awards that have been
2 bestowed upon you.
3 First, have you been honored during
4 your career by various associations for your
5 work in public health?
6 A Yes, I have.
7 Q Did you receive something called the Sedwick
8 Medal of the American Health Association?
9 A Yes.
10 Q Is that the medal given to the person who
11 has made the greatest contribution to the
12 public health in the view of the
13 association?
14 A That's correct.
15 Q Did you also receive something called the
16 Gustaf Leinhardt (phonetic) Award from the
17 Institute of Medicine of the National
18 Academy of Sciences?
19 A Yes. Yes, I have received that award. That
20 award is for a person who has contributed,
21 in the mind of the committee that does the
22 selection, contributed the most to the
23 extension of personal health services in the
24 United States.
25 Q All right. And, Doctor, approximately how
3275
1 many awards have you received during your
2 career?
3 A Well, I haven't counted them up precisely,
4 but I think it's in the neighborhood of
5 about a hundred.
6 Q All right. I'm not going to ask you about
7 very many more of them. One I wanted to ask
8 you, I noticed you're wearing a pin on your
9 lapel. Does that represent an award you
10 received?
11 A Yes, this is an award I received in November
12 of 1977 at the annual meeting of the
13 Association of American Medical Colleges.
14 That's the association of the medical
15 schools of the United States, and it's the
16 David E. Rogers Award in memory of
17 Dr. Rogers who had been Dean of the Johns
18 Hopkins School of Medicine and the first
19 president of the Robert Wood Johnson
20 Foundation. This award is for someone whose
21 career has been primarily in academic
22 medicine but who has made significant
23 contributions to improving the health of the
24 American people.
25 Q And, Dr. Richmond, have you been honored by
3276
1 academic institutions here in Indiana?
2 A Well, fortuitously, yes, I have an honorary
3 degree from Indiana University.
4 Q Now, and Doctor, I take it over your career
5 that you have published articles in the
6 medical and scientific literature?

7 A Yes, I have.
8 Q Approximately how many?
9 A Over 250.
10 Q Have you written on the topic of cancer?
11 A I have on childhood cancer and more recently
12 on the prevention of cancer.
13 Q Have you written articles concerning
14 smoking?
15 A Yes. Particularly during my time as Surgeon
16 General.
17 Q And do you still continue to write currently
18 on smoking issues?
19 A Yes, I do.
20 Q Doctor, let's now take a look in some more
21 detail at your tenure as Surgeon General of
22 the United States. Now, after nomination by
23 the president, did you have to be confirmed
24 by the Congress?
25 A Yes, I did.

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1 Q And was that for both those?
2 A By the Senate.
3 Q By the Senate. Was that both for Surgeon
4 General and Assistant Secretary?
5 A Yes, they're both presidential appointments
6 which require confirmation by the Senate.
7 Q At the time you received these two
8 appointments, had anyone ever been given
9 these two posts simultaneously?
10 A No.
11 Q Did you actually serve as Surgeon General
12 during part of the terms of two presidents?
13 A Yes. My term as Surgeon General carried
14 over from the Carter administration into the
15 early months of the Reagan administration.
16 Q Is the primary duty of the Surgeon General
17 to work to protect public health?
18 A Yes, that is, but also he has managerial
19 duties to oversee the commission core of the
20 Public Health Service.
21 Q As Surgeon General, sir, was one of your
22 duties to investigate issues surrounding
23 cigarettes and health?
24 A Yes.
25 Q Did the office of the Surgeon General issue

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1 periodic reports on various aspects
2 regarding cigarettes and health while you
3 were the Surgeon General?
4 A Yes, indeed.
5 Q What year was the first such report issued
6 under your tenure as the Surgeon General?
7 A In 1979.
8 MR. WESTBROOK: Your Honor, the
9 original of this rather large compendium is
10 in evidence. I have an excerpt for Dr.
11 Richmond to look at.
12 THE COURT: Go ahead.
13 MR. WESTBROOK: Thank you.
14 Q Dr. Richmond, I have the whole thing, but to
15 save everybody's arm, I've copied a few
16 pages that I wanted to talk to you about,
17 and I'll hand that to you.

18 MR. WESTBROOK: Your Honor, may I
19 approach with copies?
20 THE COURT: Sure.
21 MR. MOTLEY: Your Honor, excuse me.
22 Mr. Westbrook, I'm advised that somehow we
23 did not put the '79 into evidence. We move
24 it into evidence at this time, No. 8038.
25 THE COURT: Did you say it was

3279

1 marked, Mr. Motley?
2 MR. MOTLEY: No, Your Honor. I
3 think I was saving it for Dr. Richmond.
4 MR. WESTBROOK: Your Honor, I can
5 move it with Dr. Richmond. That's no
6 problem.
7 THE COURT: 35. Be Plaintiffs'
8 Exhibit 35. Any objection, Mr. Ohlemeyer?
9 MR. OHLEMEYER: For the reasons
10 previously stated, Your Honor.
11 THE COURT: Objection is noted.
12 MR. WAGNER: We have a hearsay
13 objection, too, Your Honor.
14 THE COURT: Noted and overruled.
15 Plaintiffs' 35 will be admitted.

16 (Plaintiffs' Exhibit(s) 35 received in
17 evidence.)

18 Q Dr. Richmond, do you recognize the excerpt
19 that I've handed to you as an excerpt from
20 the 1979 Surgeon General's Report that was
21 issued under your authority?

22 A Yes, I do.

23 Q All right. Dr. Richmond, the whole
24 document, by its size, it is apparent that
25 this is a document that took some time to

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1 write; is that correct?

2 A That's correct.

3 Q All right. As Surgeon General, Dr.
4 Richmond, were you required to sit down and
5 write every word of this report yourself?

6 A No. I did not. But I arranged to have it
7 written.

8 Q And how did you go about arranging to have
9 it written? Was there a committee that got
10 scientists involved who were expert in the
11 field?

12 A Well, I had a director of our Office on
13 Smoking and Health in the United States
14 Public Health Service, and he recruited
15 professional staff to work with him, and
16 particularly Dr. David Burns --

17 Q The jury has heard about Dr. Burns, okay.

18 A -- became very central in helping to design
19 this report and its organization, and it
20 ultimately ended up being a 24-chapter
21 report.

22 Q So after the experts drafted sections of the
23 report, did you have a procedure in place
24 for those draft sections to be reviewed by
25 other experts to be sure that they were good

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1 science?

2 A Yes. And in the document we list all of the

3 people who read the various chapters,
4 critically, for us. And we then went
5 through the process of reviewing their
6 critiques and rewriting the chapters. But I
7 had the final responsibility for passing on
8 the entire document, and I read the complete
9 document word for word, so that it does
10 carry my signature.

11 Q And did you also read the reviews of the
12 chapters that were being done as the report
13 was being prepared?

14 A Yes, I did.

15 Q Dr. Richmond, for how long had the Surgeon
16 General been issuing reports on cigarettes
17 and health by the time you issued your first
18 report in 1979?

19 A The first major report was in 1964. That
20 was the report of the Surgeon General's
21 Advisory Committee on Smoking and Health.
22 And so this was the 15th anniversary report
23 of the first Surgeon General's Report.

24 Q And did you regard this 1979 report as
25 something of a milestone being the 15th

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1 anniversary report?

2 A Yes, it in my view was. And there was
3 considerable scientific literature that had
4 appeared since the first report, and as I
5 indicate in the document, there are over
6 3,000 publications. And these were
7 systematically reviewed for this report, so
8 that it was a 15-year summary of all of the
9 documentation concerning smoking and health
10 that had developed in that period.

11 Q Okay, Doctor. Let's get right to the heart
12 of the matter. Can we take a look, Doctor,
13 at the preface page, Roman numeral VII, if
14 you can find that in your copy. It's in a
15 few pages.

16 Dr. Richmond, did you write the preface
17 yourself?

18 A Yes, I did.

19 Q All right. Let me read the first two
20 paragraphs of the preface, and I'd like to
21 ask you a question.

22 "On January 11, 1964, the Surgeon
23 General's Advisory Committee on Smoking and
24 Health concluded, 'Cigarette smoking is a
25 health hazard of sufficient importance in

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1 the United States to warrant appropriate
2 remedial action.'

3 "Today, this report reinforces that
4 major conclusion. It is backed up by the
5 weight of thousands of additional studies
6 performed throughout the world. Fifteen
7 years later, the scientific evidence on the
8 health hazards of cigarette smoking is
9 overwhelming."

10 Dr. Richmond, were those your words in
11 1979?

12 A Yes, they were.

13 Q And is that a conclusion that you agreed

14 with in 1979?
15 A Yes, I did.
16 Q Is that a conclusion you agree with today?
17 A Yes, I do.
18 Q Dr. Richmond --
19 A I should add that --
20 Q Go ahead, sir.
21 A The data have become even more overwhelming,
22 but it was overwhelming then.
23 Q Dr. Richmond, in 1979, did the tobacco
24 industry agree and accept your conclusion
25 that the scientific evidence on the health

3284

1 hazards of cigarette smoking was
2 overwhelming?
3 A No, no.
4 MR. WAGNER: Objection, no
5 foundation.
6 THE COURT: Was there an objection
7 there?
8 MR. WAGNER: Yes, Your Honor, I
9 objected. No foundation.
10 THE COURT: That objection is
11 overruled.

12 Doctor, what was your answer again?
13 Q Did the tobacco industry agree in 1979 with
14 your scientific conclusions?
15 A No, they did not.
16 Q Did you conclude in 1979, Doctor, that
17 cigarette smoking caused lung cancer?
18 A Yes, I did.
19 Q Did the tobacco industry agree with that
20 conclusion in 1979?
21 A No, they did not.
22 Q Doctor, was it your intention in preparing
23 this 15th anniversary report to gather all
24 the available scientific evidence on smoking
25 and health, put it together and analyze it

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1 in your report?
2 A Yes, and that's what the report did.
3 Q All right. And did your people try to
4 gather whatever evidence was available?
5 A That's correct.
6 Q Did you get any assistance from the tobacco
7 industry in gathering this evidence?
8 A No, we did not.
9 Q Did the tobacco industry open any of its
10 internal files and let you see their
11 internal research?
12 A No, they did not.
13 MR. WAGNER: Objection, Your Honor,
14 lack of foundation.
15 THE COURT: Overruled. Your answer
16 was?
17 A No, they did not.
18 THE COURT: Thank you.
19 Q Dr. Rich, I'd like to show you a pledge that
20 the tobacco companies made to the United
21 States public in 1954, called the Frank
22 Statement.
23 MR. WESTBROOK: Your Honor, this
24 document is in evidence.

THE COURT: All right.

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1 MR. OHLEMEYER: For the record,
2 Your Honor, I object to Mr. Westbrook's
3 comment on the evidence. He can show -- I
4 have no objection to showing the doctor the
5 exhibit without his editorial comments.

6 THE COURT: Is it the fact that it
7 was in evidence?

8 MR. OHLEMEYER: No. The statement
9 that preceded that.

10 MR. WESTBROOK: I think when I said
11 it was to the American public. I'll
12 withdraw the statement, Your Honor.

13 THE COURT: All right.

14 Q Dr. Richmond, what I'm going to do is put
15 the big one up here and give you a small one
16 so the jury can see it and you can see it as
17 well.

18 MR. WESTBROOK: Your Honor, for the
19 record, that's 10245A.

20 THE COURT: Thank you.

21 MR. WESTBROOK: As Your Honor will
22 recall, we have the actual copy in the
23 Muncie paper which is hard to read, and
24 we've attached a readable one behind it.

25 THE COURT: All right.

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1 Q Dr. Richmond, let me hand you a readable
2 copy of the Frank Statement. Put this one
3 up.

4 Dr. Richmond, the document is entitled,
5 "A Frank Statement to Cigarette Smokers."
6 And I want to direct your attention to a
7 statement that the tobacco companies made in
8 this document. Down at the bottom of the
9 second column, Dr. Richmond, there's a
10 statement, "We always have and always will
11 cooperate closely with those whose task it
12 is to safeguard the public health."

13 Do you see that statement?

14 A Yes, I do.

15 Q Dr. Richmond, when you were Surgeon General,
16 was it your task to safeguard the public
17 health?

18 A Yes, that was my responsibility.

19 Q Did the tobacco companies cooperate with you
20 in your efforts to safeguard the public
21 health?

22 A No. No, they did not.

23 MR. WAGNER: Objection. Leading,
24 suggestive, argumentative, no foundation.

25 MR. WESTBROOK: Your Honor, I can't
3288

1 imagine --

2 THE COURT: Overruled.

3 MR. WAGNER: It's also improper for
4 a witness to comment upon what is said in
5 somebody else's document.

6 THE COURT: Overruled. Ask your
7 question again.

8 Q Dr. Richmond, as a Surgeon General whose
9 task it was to safeguard the public health,

10 did the tobacco companies cooperate in your
11 efforts to safeguard the public health?

12 A No.

13 Q Dr. Richmond, I'd like to show you another
14 document that is in evidence. It's
15 Plaintiffs' Exhibit 14333.

16 MR. WESTBROOK: Your Honor, for the
17 record, this is the 1962 Alan Rodgman memo,
18 Plaintiffs' Exhibit 14333.

19 THE COURT: All right. Thank you.

20 Q I'll hand this to you, Dr. Richmond. This
21 is a document that's in evidence in this
22 case, Dr. Richmond, and I'd like you to take
23 a look, if you would, Doctor, at page 7 of
24 this document written in 1962.

25 MR. WESTBROOK: Your Honor, this
3289

1 document has been admitted against RJ
2 Reynolds. So that the record is clear, it's
3 a Reynolds document, admitted at this time
4 against Reynolds.

5 THE COURT: All right.

6 Q Dr. Richmond, let me direct your attention
7 on page 7 to the first paragraph under (e),
8 Evidence to Date, where Dr. Rodgman of
9 Reynolds says, "Obviously the amount of
10 evidence accumulated to indict cigarette
11 smoke as a health hazard is overwhelming.
12 The evidence challenging such an indictment
13 is scant."

14 Dr. Richmond, is that the same language
15 pretty much as you used in 1979 when you
16 said that the scientific evidence on the
17 health hazards of cigarette smoking is
18 overwhelming?

19 MR. WAGNER: Objection, Your Honor.
20 Leading, suggestive, argumentative, no
21 foundation.

22 MR. WESTBROOK: I'll rephrase.

23 THE COURT: Sustained.

24 MR. WESTBROOK: Let me rephrase.

25 Q Dr. Richmond, let me hand you the preface
3290

1 language. Would you compare the preface
2 language of your 1979 Surgeon General's
3 Report concerning the state of evidence in
4 1979 as you knew it with the state of the
5 evidence in 1962 as stated by Dr. Rodgman
6 and tell me if you can make a comparison
7 between those two statements.

8 MR. WAGNER: Same objection, Your
9 Honor.

10 THE COURT: Overruled.

11 A Well, in my statement, I say 15 years later,
12 after the first Surgeon General's Report on
13 Smoking and Health, the scientific evidence
14 on the health hazards of cigarette smoking
15 is overwhelming. But in this document, he
16 uses this; I think this is 12 years earlier,
17 isn't it?

18 Q 1962, sir.

19 A Seventeen years earlier. He uses the same
20 phraseology that the evidence is

21 overwhelming that cigarette smoking is a
22 health hazard.
23 Q When you --
24 A And that the evidence is overwhelming.
25 Q When you were preparing your 1979 Surgeon
3291
1 General's report, did any of the tobacco
2 companies come forward and tell you that
3 they had written in 1962 that the evidence
4 was overwhelming?
5 A No, they did not.
6 Q Dr. Richmond, are you familiar with a group
7 called the Council for Tobacco Research or
8 CTR?
9 A Yes, I am.
10 Q Do you know that the tobacco companies
11 funded the CTR?
12 A Yes, I know that.
13 Q To your knowledge, Dr. Richmond, did the CTR
14 fund some research on tobacco?
15 A Yes. They accepted proposals for research
16 and then funded some of them.
17 Q All right. And did some Surgeon General's
18 report actually cite some CTR research?
19 A CTR-funded research, yes.
20 Q And some of those CTR-sponsored articles
21 appeared in Surgeon General's reports like
22 yourself.
23 A That's correct.
24 Q Dr. Richmond --
25 A The publications appeared in peer-reviewed
3292
1 journals, yes.
2 Q Dr. Richmond, from your experience with the
3 Surgeon General's reports, including the
4 work that you did in supervising the
5 preparation of the Surgeon General's
6 reports, did any of the CTR-sponsored
7 articles that appeared in the Surgeon
8 General's reports reveal anything about what
9 the industry knew internally about smoking
10 and health?
11 MR. WAGNER: Objection, Your Honor,
12 no foundation as to what the industry knew.
13 There's no foundation that this witness
14 knows everything about what the industry
15 knew.
16 THE COURT: That was not the
17 question. The objection is overruled.
18 Restate your question.
19 Q Dr. Richmond, to your knowledge, did any of
20 the CTR-sponsored research results that were
21 cited in Surgeon General's reports reveal
22 anything about what the tobacco industry
23 knew internally about smoking and health?
24 MR. WAGNER: Same objection.
25 A No. No, these were all published reports.
3293
1 Q Dr. Richmond, while you were Surgeon
2 General, and about the time of the issuance
3 of your 1979 Surgeon General's Report, did
4 you become aware of efforts by the Tobacco
5 Institute to undermine your efforts at

6 issuing the Surgeon General's Report?
7 MR. OHLEMEYER: Objection, Your
8 Honor, it's argumentative.
9 MR. WAGNER: And it's leading and
10 suggestive.
11 THE COURT: Why don't you rephrase
12 that, Counselor. Sustained.
13 Q Dr. Richmond, about the time that you were
14 getting ready to issue the 1979 Surgeon
15 General's Report and thereafter, did you
16 become aware of any efforts by the tobacco
17 industry in connection with the issuance of
18 your report?
19 A Yes. I did become aware of such efforts.
20 Q And would you tell the jury what those
21 efforts as you observed them at the time in
22 1979 that these events were happening.
23 A Well, we -- we had planned to present the
24 report publicly at a press conference in
25 Washington on the exact date of the 15th

3294

1 anniversary of the first Surgeon General's
2 Report.
3 Q What date was that?
4 A And that was to be January 11th of 1979.
5 Q Let me get this out, Doctor, so we can have
6 the dates in front of us.
7 So the Surgeon General's Report was to
8 come out on January 11th?
9 A 11th, that's correct.
10 Q In 1979?
11 A 1979.
12 Q All right. Now, Doctor, in order to issue
13 the report on January 11, 1979, did you have
14 to have the actual copies ready before
15 January 11, 1979?
16 A Yes. We were going to release them to
17 credentialized members of the press 24 hours
18 in advance of that press conference.
19 Q All right. So on January 10th --
20 A So on January 10th.
21 Q So on January 10, 1979, the only people who
22 were supposed to have the report were you,
23 the Surgeon General, and the credentialed
24 press?

25 A The credentialed press with an embargo that
3295

1 they were not to release any comments until
2 after the press conference on January 11th.
3 Q Okay. And would you continue now, Doctor,
4 what happened as you observed it in
5 connection with the events preceding the
6 issuance of the Surgeon General's Report on
7 January 11th?
8 A Well, we began to hear that the Tobacco
9 Institute was planning to have a press
10 conference on the day prior to our press
11 conference.
12 Q On January 10th?
13 A On January 10th. That's correct.
14 Q All right.
15 A In order to refute the report.
16 Q And did that press conference take place?

17 A It took place. It struck me, I might say,
18 as a bizarre kind of thing to do, to propose
19 to refute a report which had not yet been
20 publicly made available.

21 Q And in connection with the Tobacco
22 Institute's attempted refutation of your
23 Surgeon General's Report, did you become
24 aware that the Tobacco Institute had
25 prepared its own report on smoking and

3296

1 health?

2 A Well, we did at the time of their press
3 conference.

4 MR. WESTBROOK: Your Honor, this
5 document is already admitted Plaintiffs'
6 Exhibit 7968.

7 THE COURT: All right.

8 Q Dr. Richmond, let me hand you a copy of
9 Exhibit 7968, which is in evidence. And
10 Dr. Richmond, the question I have for you
11 about that report, sir, is, is it apparent
12 from you holding that report in your hands
13 which appears to be 168 pages long, that
14 this report was not prepared on the day it
15 was issued, January 10, 1979?

16 A Yes, clearly this document could not have
17 been prepared that quickly.

18 Q All right. Dr. Richmond, I'd like to show
19 you another document that's in evidence,
20 Plaintiffs' Exhibit 7129.

21 MR. WESTBROOK: Your Honor, I have
22 copies of this exhibit for the jury I'd like
23 to hand to the jurors and have them follow
24 along.

25 THE COURT: All right.

3297

1 Q All right. Dr. Richmond, let's take a look
2 at this document entitled, "Remarks of
3 Thomas Frank About Executive Committee
4 Meeting January 25, 1979." And so we can
5 orient yourself, Doctor, is that about two
6 weeks after you issued the Surgeon General's
7 Report?

8 A That's correct.

9 Q The first paragraph states, "We'd like to
10 report to you today on the activities
11 undertaken by the Tobacco Institute to deal
12 with the 15th anniversary report of the
13 Surgeon General which, as you will recall,
14 was signaled a year ago as a media event."

15 Dr. Richmond, did you regard the 1979
16 Surgeon General's Report and the science in
17 it as a media event?

18 A No, we never did, and I'm surprised to see
19 it referred to in that manner. We thought
20 it was a straightforward public educational
21 presentation of the data that we had
22 reviewed and presented.

23 MR. SHOCKLEY: Your Honor, as a
24 matter of procedure, when counsel reads from
25 an exhibit which was previously admitted

3298

1 only as against certain defendants --

2 THE COURT: You need to mention
3 that, Counselor.
4 MR. WESTBROOK: Yes, Your Honor.
5 This document was admitted against the
6 Tobacco Institute and its members in 1979,
7 and we have that list if you would like to
8 reread that, Your Honor.
9 THE COURT: I've already read that.
10 Go ahead.
11 Q Dr. Richmond, let's continue with the next
12 paragraph. "I'd like to begin by mentioning
13 the goals which we set. First, we wanted to
14 ensure that the initial media coverage would
15 include the Tobacco Institute position."
16 Did the Tobacco Institute achieve that
17 aim of getting the initial media coverage,
18 including its position?
19 MR. WAGNER: Objection, Your Honor.
20 Leading, suggestive, hearsay.
21 THE COURT: Overruled. You can
22 answer that, Doctor.
23 A You want to pose the question again.
24 Q Yes, sir. Yes, Doctor.
25 The goals listed on the document, the
3299
1 first goal is, "We wanted to ensure that the
2 initial media coverage would include the
3 Tobacco Institute position."
4 And my question to you, Doctor, is did
5 the Tobacco Institute, in fact, get initial
6 media coverage for its position?
7 MR. WAGNER: Same objection.
8 A Yes, they did.
9 Q And how did they do that?
10 A Well, they did that by holding a press
11 conference the day prior to the issuance of
12 our report in order to refute the report.
13 Q And then next paragraph says, "Second, we
14 wanted to characterize the new Surgeon
15 General's Report as a media event rather
16 than a scientific exercise."
17 Did the Tobacco Institute, in fact, do
18 that?
19 MR. WAGNER: Same objection.
20 THE COURT: Overruled.
21 A They tried to characterize it as a media
22 event, but I don't think it was ever
23 publicly perceived by professionals and the
24 public generally as a media event.
25 Q All right. Let's go down and skip down to
3300
1 the bottom of the page where the document
2 says, "To achieve these objectives, the
3 Tobacco Institute engaged in the following
4 activities." Under N2, it says, "Later, we
5 started to develop our own report on smoking
6 and health for publication at the time HEW
7 released its new report."
8 And was that, in fact, done? Was that,
9 in fact, released?
10 A Yes.
11 MR. WAGNER: Same objection.
12 THE COURT: Overruled. Your answer

13 was?
14 A Yes. And that is the Smoking and Health
15 1964/1979, the Continuing Controversy.
16 That's this document.
17 Q Dr. Richmond, the title of the document, the
18 Continuing Controversy, was that a position
19 that you heard more than once from the
20 tobacco industry?
21 MR. WAGNER: Same objection.
22 A Yes, indeed.
23 THE COURT: You may answer.
24 A Yes, they -- they constantly referred to the
25 issues of smoking and health as a continuing

3301

1 controversy.
2 Q Let's continue, Dr. Richmond, about the
3 paragraph 2, which talks about the writing
4 of the TI document. "Anne Duffin was
5 assigned the full-time responsibility of
6 researching, writing and editing the report
7 under the direction and guidance of the
8 Shook, Hardy & Bacon firm and Dr. Wate. Our
9 report entitled Smoking and Health 1964 to
10 1979, the Continuing Controversy, covered
11 each of the major areas we believe would be
12 treated by HEW."

13 Dr. Richmond, assuming that the Shook,
14 Hardy & Bacon firm was a law firm, is it
15 usual or unusual in your experience for
16 lawyers to edit scientific reports?

17 MR. WAGNER: Same objection.

18 MR. OHLEMEYER: Objection.

19 THE COURT: I'm going to sustain
20 that objection, Counselor. You don't have
21 to answer that, Doctor.

22 Q Dr. Richmond, when you prepared and issued
23 the Surgeon General's Report, your report,
24 did you have lawyers edit it?

25 A No.

3302

1 Q Looking down on paragraph 5, Doctor, it
2 says, "With the assistance of Shook, Hardy &
3 Bacon, we edited each chapter of the TI
4 report. This was done during December and
5 early January."

6 Dr. Richmond, while you were Surgeon
7 General preparing to issue your report on
8 January 11th, did you have any idea that the
9 Tobacco Institute was preparing a document
10 that was being edited with the assistance of
11 Shook, Hardy & Bacon

12 MR. OHLEMEYER: Objection, Your
13 Honor, argumentative.

14 MR. WAGNER: Same objection.

15 THE COURT: You may answer that.
16 Overruled.

17 A No, I had no awareness of this.

18 Q Doctor, flip over to the next page,
19 paragraph 9, which discusses activities on
20 January 9th, as you can see from paragraph
21 8.

22 "That day we also conducted a heavy
23 program of internal communications,

24 supplying our TI press kit to the Board of
25 Directors, the Committee of Counsel, the

3303

1 Communications Committee and other industry
2 executives, including several outside the
3 United States. Government relations staff
4 also distributed our materials to our list
5 of hard-core tobacco Congressmen on the
6 Hill."

7 Doctor, while you were Surgeon General
8 in 1979, were you aware that there was a
9 group of Congressmen on the Hill who were
10 known as hard-core tobacco Congressmen?

11 MR. WAGNER: Objection, Your Honor.
12 Leading, suggestive, invades the right of
13 the defense in this case to lobby, violates
14 the Court's limiting order, too.

15 THE COURT: Overruled. You may
16 answer.

17 A Well, it was generally understood that there
18 were a number of congressmen and senators,
19 particularly from tobacco-growing states,
20 who were highly supportive of what the
21 industry was doing.

22 Q So we can continue to orient yourself,
23 Doctor, we're talking about the paragraph
24 now dealing with January 9th, 1979. That's
25 two days before your report was issued;

3304

1 correct?

2 A That's correct.

3 Q All right. Paragraph 10, "Throughout the
4 afternoon and evening, the institute team
5 was thoroughly briefed and rehearsed on its
6 performance the next day with the assistance
7 of two members of our Kansas City legal
8 counsel."

9 Dr. Richmond, when you were preparing
10 your press conference on January 11th, were
11 you briefed and rehearsed by any lawyers as
12 to what you were to say?

13 A No, we were not.

14 MR. WAGNER: Objection.

15 Q Dr. Richmond, over on paragraph 11. "Our
16 press conference began promptly at 11:00
17 a.m. on January 10th." That's the day
18 before you issued your report?

19 A That's correct.

20 Q "With coverage by 35 news media people plus
21 the two wire services and the three major
22 television networks. Immediately afterward,
23 press kits were sent by messenger to those
24 papers who did not send representatives."

25 Paragraph 12, "A few minutes after

3305

1 2:00, our PR staff provided the Institute
2 with its first copy of the HEW Surgeon
3 General's Report. At 2:00 p.m. on January
4 10th."

5 Dr. Richmond, was there a legitimate
6 way that the Tobacco Institute could have
7 had your report at 2:00 p.m. on the day
8 before it was issued?

9 MR. OHLEMEYER: Objection, Your
10 Honor, it's argumentative.
11 MR. WAGNER: Argumentative.
12 THE COURT: Sustained. Rephrase
13 it.
14 Q Dr. Richmond, under your distribution
15 processes for the 1979 Surgeon General's
16 report, did an advance copy of the Surgeon
17 General's report go to the Tobacco
18 Institute?
19 A No, it did not.
20 Q Do you know of any way that the Tobacco
21 Institute could, through legitimate
22 channels, have gotten a copy of the '79
23 report the day before it was issued?
24 MR. OHLEMEYER: Same objection.
25 MR. WAGNER: Objection, Your Honor,

3306

1 relevancy. What's the relevancy of all of
2 this?
3 MR. WESTBROOK: Your Honor, I laid
4 the foundation as to the proper channels of
5 the --
6 THE COURT: Legitimate channels.
7 You want to rephrase that.
8 Q Let's take out legitimate. Through official
9 channels.
10 A No, there would be have been no way, because
11 each of the copies were numbered and each of
12 the people from the press who were
13 credentialized signed for that individual
14 copy, so there was no way it should have
15 been available to anyone but a
16 credentialized press representative.
17 Q Doctor, going down to paragraph 13, "Also
18 during this period," the document reflects
19 we're talking about January 10th, "the
20 government relation staff had been active in
21 counseling and guiding the responses from
22 members of Congress, including Senators
23 Morgan, Helms and Ford, and Congressmen
24 Fountain and Pryor. By the afternoon of the
25 11th we were getting out to the industry

3307

1 copies of the 1,200-page HEW report.
2 Although they were scarce as hen's teeth in
3 Washington, we were able, through the
4 efforts of our government relations staff,
5 to secure about 150 copies of the 535 copies
6 that the secretary of HEW had distributed to
7 Congress."
8 Dr. Richmond, is it accurate that you
9 provided a copy of the report to each member
10 of Congress?
11 A Yes, that's correct.
12 Q Until you read this document, Doctor, were
13 you aware that the tobacco companies had
14 retrieved 150 copies by the day you issued
15 your report?
16 MR. WAGNER: Objection, Your Honor,
17 relevancy.
18 A No.
19 THE COURT: Overruled. Your answer

20 was?
21 A No, I had not been aware they had retrieved
22 these copies from congressional offices.
23 Q The paragraph concludes, "It's safe to say
24 that by the next day we had more copies of
25 the report than Joe Califano?

3308

1 A I think they're right.
2 Q Was Califano your boss and the secretary of
3 HEW?
4 A That's true.
5 Q Dr. Richmond, did your 1979 report have a
6 section on secondhand smoke?
7 A Yes, it did.
8 Q At that time, was secondhand smoke a major
9 focus of your report?
10 A No. As I indicated in the report, we were
11 becoming aware of the hazards of secondhand
12 smoke, and that's why I made the suggestion
13 in the report that we needed more research
14 on that issue.
15 Q At the time the 1979 Surgeon General's
16 Report was issued, had the tobacco industry
17 provided your office with any of its
18 research on secondhand smoke?
19 A No, they had not.
20 Q Doctor, have you since come to see some of
21 the tobacco industries' research on
22 secondhand smoke that predated 1979?
23 A I think only what has been retrieved by
24 search process.
25 Q You're talking about search process through

3309

1 the process of lawsuits?
2 A That's correct.
3 Q Dr. Richmond, based on what you have seen,
4 would it have been helpful to you as the
5 Surgeon General to have seen the tobacco
6 industry's research prior to 1979 on
7 secondhand smoke?
8 MR. OHLEMEYER: Objection.
9 MR. WAGNER: Objection. Vague, no
10 probative value, speculation, no foundation.
11 MR. WESTBROOK: Your Honor, he was
12 the man making the decision.
13 THE COURT: Overruled. You may
14 answer.
15 A Well, it would have been extremely helpful
16 if I had had more data. And I always
17 welcomed data. Indeed, I kept insisting
18 that they had research that they had been
19 conducting in a variety of smoking and
20 health issues that were not available to us.
21 Q Doctor, as the report stood in 1979 with the
22 information you had on secondhand smoke,
23 would the report have provided a medical
24 basis for someone to leave their job on a
25 medical condition because they were in

3310

1 smoke?
2 MR. OHLEMEYER: Objection, Your
3 Honor.
4 MR. WAGNER: Objection, Your Honor.

5 THE COURT: Sustained.
6 Q Doctor, as Surgeon General, did you come to
7 know a Walker Merriman of the Tobacco
8 Institute?
9 A Mr. Walter Merriman?
10 Q Yes. How did you come to know him?
11 A Mainly through debates on the MacNeil-Lehrer
12 show.
13 Q That's a television program on --
14 A The evening, evening PBS television news
15 then.
16 Q Did you debate Mr. Merriman?
17 A Yes, I did.
18 Q And do you recall the position that
19 Mr. Merriman on behalf of the Tobacco
20 Institute took on the issues involving
21 smoking and health?
22 MR. WAGNER: Again, Your Honor,
23 this is all hearsay stuff that's all outside
24 the confines of this courtroom, asking this
25 witness to comment about conversations that

3311

1 took place outside the courtroom. It's
2 hearsay.
3 MR. WESTBROOK: Your Honor, a
4 statement of the president of the Tobacco
5 Institute is not a hearsay statement. The
6 man made a statement. Tobacco Institute is
7 a defendant.

8 THE COURT: I understand that,
9 Counselor.

10 MR. WESTBROOK: In addition, Your
11 Honor, we're not offering it for the truth
12 of the matter asserted.

13 THE COURT: Why are you offering
14 it?

15 MR. WESTBROOK: We're offering it
16 to they took this position to continue the
17 controversy. In fact, we contend his
18 statement is false.

19 THE COURT: Objection is overruled.
20 Repeat your question.

21 Q Dr. Richmond, do you recall the positions
22 that Mr. Merriman on behalf of the Tobacco
23 Institute took on issues regarding smoking
24 and health and whether the case had been
25 proven as to lung cancer, for instance?

3312

1 MR. WAGNER: Same objection.

2 THE COURT: Overruled.

3 A Yes, he denied that there was any
4 association between cigarette smoking and
5 health, and that there were no data that
6 really established that relationship. And
7 he was rather forceful in taking that
8 position.

9 Q And that -- was that a consistent position
10 that you experienced during your tenure as
11 Surgeon General of the United States from
12 1977 to 1981 from the tobacco industry?

13 A Yes, it was.

14 Q And did you participate in the preparation
15 of other Surgeon General's reports on

16 aspects of cigarettes and health?
17 A Yes, I did.
18 Q And in the preparation of any of those
19 reports, did you ever get cooperation from
20 the tobacco industry in preparing those
21 reports?
22 A No, I did not.
23 Q Dr. Richmond, while you were Surgeon
24 General, did you become interested in the
25 issue of the chemicals being added to

3313

1 cigarettes by the tobacco companies?
2 A Yes, I was very concerned about the
3 additives.
4 Q What did you try to do to allay your
5 concern?
6 A Well, I thought that it would be prudent for
7 us to try to learn what the tobacco firms
8 were doing by way of manipulating additives
9 in cigarettes. This was at a time when they
10 were making some efforts to achieve lower
11 tar and lower nicotine levels. That was
12 changing the palatability, the taste of
13 cigarette smoking, and we had reason to
14 believe that they were changing additives,
15 either qualitatively or quantitatively, or
16 both, and I therefore sought to find out
17 what it was they were adding to cigarettes
18 beyond tobacco.
19 Q Did you ask the tobacco companies directly
20 to tell you what was being added to
21 cigarettes?
22 A Yes, I did.
23 Q Did you ask the tobacco company lawyers to
24 tell you that?
25 A Yes, I did.

3314

1 Q Did you write to the tobacco companies and
2 ask them to tell you what additives were
3 being put into cigarettes?
4 A Yes, I did.
5 MR. WESTBROOK: Your Honor, may I
6 approach the witness with Exhibit 1378?
7 THE COURT: Go ahead.
8 Q Dr. Richmond, this is Exhibit 1378 on the
9 stationery of the Department of Health and
10 Human Services and its signed by a Julius B.
11 Richmond. Is that you, sir?
12 A That is my signature, that's correct.
13 Q You recognize the document, sir?
14 A Yes, I do.
15 Q Is it a letter you wrote?
16 A Yes, it is.
17 MR. WESTBROOK: Your Honor, we
18 would move Exhibit 1678 into evidence.
19 MR. OHLEMEYER: Objection, Your
20 Honor, not having any relevance to the
21 issues to be decided in this case.
22 MR. SHOCKLEY: Are you offering
23 that as to all defendants?
24 MR. WESTBROOK: We're offering that
25 right now as to the American Tobacco

3315

1 Company's successors, but I'm going to ask a
2 question that will make it relevant to all
3 defendants.

4 THE COURT: Ask the question.

5 Q Dr. Richmond, did you write similar letters
6 to all the tobacco companies?

7 A Yes, I did.

8 Q All right. And before we get into what the
9 response was, did you get similar responses
10 from all the companies?

11 A Yes, I did.

12 MR. WESTBROOK: Your Honor, we move
13 the document into evidence.

14 MR. OHLEMEYER: Same objection,
15 Your Honor, Rule 403.

16 THE COURT: Any other objection?

17 MR. SHOCKLEY: Well, I'm not
18 entirely sure who the offer pertains to. If
19 the offer pertains to American Brands, I
20 object to that. My client didn't even exist
21 until 1985.

22 MR. WESTBROOK: Your Honor, this
23 particular document, we're offering it
24 against American Tobacco Company and its
25 successors. Based on the testimony I'll

3316

1 elicit from Dr. Richmond, the response was
2 the same to the similar letters from all the
3 companies, we're going to offer the evidence
4 against all the companies.

5 MR. SHOCKLEY: There's no reference
6 to successorship, if that's the nature of
7 his offer.

8 THE COURT: Any comment about
9 American Brands, Counselor?

10 MR. MOTLEY: May I, Your Honor?

11 MR. WESTBROOK: Your Honor, my
12 American Brands expert is up.

13 THE COURT: All right.

14 MR. MOTLEY: Your Honor, we will
15 connect up under Rule 104. This is
16 conditionally offered against American
17 Brands, subject to being connected up with
18 respect to the successorship issues.

19 THE COURT: Objection is noted and
20 overruled on Counselor's representation to
21 the Court that it will be connected up with
22 American Brands. It will be admitted,
23 13678.

24 (Plaintiffs' Exhibit(s) 13678 received
25 in evidence.)

3317

1 MR. SCHEINER: Your Honor, is that
2 only to manufacturing defendants?

3 MR. MOTLEY: That's correct, Your
4 Honor.

5 THE COURT: Manufacturing
6 defendants.

7 MR. MOTLEY: Yes, Your Honor.

8 THE COURT: That's what I
9 understood.

10 MR. WESTBROOK: May I approach the
11 bailiff with the additional copies for the

12 jury?
13 BY MR. WESTBROOK:
14 Q Dr. Richmond, turning to your letter now,
15 and I see a stamp at the top appears to be
16 November 12, 1980. Does that appear correct
17 to you, Doctor?
18 A That's correct.
19 Q And did you by the way, Doctor, send an
20 identical letter to each of the American
21 tobacco companies?
22 A That's correct.
23 Q All right. First paragraph, "Dear,
24 Mr. Louges: I am writing you and other
25 cigarette manufacturing firms to acknowledge

3318

1 the replies I've received over the past
2 several months to my letter of July 21,
3 1980. I've waited until now to do this so
4 that I could frame a single response to the
5 letters I have received."

6 Do you recall writing previously to the
7 tobacco companies on this issue of
8 additives?

9 A Yes, that's correct.

10 Q All right. The second paragraph says, "My
11 letter asked you and the other manufacturers
12 to provide us with a list of the substances
13 you add to tobacco in manufacturing your
14 brands. I ask that you provide us this
15 information because during a long and
16 careful study of all available evidence, we
17 determined that information on those
18 substances actually in use is not publicly
19 available."

20 Is that what you determined?

21 A That's correct.

22 Q Then the next paragraph talks about some
23 responses that you got from the tobacco
24 companies.

25 Did the responses that you got provide

3319

1 you with information on the additives
2 actually being used in particular cigarette
3 brands?

4 MR. WAGNER: Objection, relevancy,
5 Your Honor. No issue in this case about
6 additives.

7 THE COURT: Overruled.

8 A No. This was not responsive because it
9 didn't specifically tell us what was in
10 individual cigarette brands.

11 Q The paragraph, paragraph 3 says that you got
12 one list from Reynolds with a thousand
13 substances. Do you see that?

14 A That's correct.

15 Q And then another list with 300 substances;
16 correct?

17 A That's correct.

18 Q So you had two lists totalling 1,300
19 substances. And from that list could you
20 tell what additive was being used in a
21 Marlboro, for instance?

22 A No, there was no way of knowing from what

23 they provided me.

24 0 Without knowing --

25 A And, indeed, I went through the list and one

1 of the substances was shellac. I kept
2 asking whether they were putting shellac in
3 cigarettes, but to this day nobody has ever
4 refuted that or acknowledged it.

5 Q So you picked one out of the list and you
6 asked the industry, are you using shellac?
7 They wouldn't tell you?

8 A That's correct.

9 Q Now, right at the bottom, the last paragraph
10 on the first page, Dr. Richmond, you say,
11 "It is within our capability to develop a
12 protocol, but we cannot independently
13 identify the substances with available
14 scientific technology and a reasonable
15 expenditure of resources. We must turn to
16 the manufacturer for this information and we
17 have asked for it on a voluntary basis."

18 Is that what you did, sir?

19 A Yes, that's correct.

20 Q Did you have the legal authority to force
21 these tobacco companies to reveal their
22 additives to you?

23 MR. WAGNER: Leading and
24 suggestive, Your Honor.

25 THE COURT: You may answer that, 3321

1 Doctor.

2 A No, I did not.

3 Q Let's turn to the second page, Doctor. In
4 the second paragraph you outline what you'd
5 like to do. "In the interest of protecting
6 the public health, I am asking you to join
7 me in devising a mutually acceptable way to
8 address this problem."

9 Doctor, were you asking for cooperation
10 from the industry?

11 A Yes, I was.

12 MR. WAGNER: Your Honor, it's
13 improper to ask the witness what he meant by
14 statements that he wrote outside the Court.
15 Can't we just have direct questions to the
16 witness about what he did instead of reading
17 from these documents? It seems to me that
18 this is highly improper.

19 MR. WESTBROOK: I don't think
20 there's anything improper about asking a
21 witness whether he wrote a document and what
22 he meant by the words.

23 THE COURT: Overruled.

24 Q Doctor, were you asking for cooperation from
25 the industry on this issue of additives?

3322

1 A Yes, I was.

2 Q And you go on to say, "I believe we can
3 accomplish this, and if we move together
4 immediately to, number one, identify all
5 substances you presently use in the brands
6 which you are marketing in the United
7 States."

8 Did the tobacco industry ever give you
9 that information?
10 A No.
11 MR. WAGNER: Same objection.
12 THE COURT: Overruled.
13 Q Did they ever give you that?
14 A No, and they haven't to this day.
15 Q No. 2, "Agree to add no other substances
16 until the health effects of those presently
17 used are assessed."
18 Did the tobacco industry agree to that?
19 A No, they did not.
20 Q 3, "Develop a mutually agreed upon testing
21 program and review process to determine
22 possible acute and long-term toxic and
23 teratogenic effects of each substance in
24 use."
25 MR. WAGNER: Objection.

3323

1 A No, they did not.
2 MR. WAGNER: Judge, can I have a
3 continuing objection to this form of
4 question so I don't have to keep
5 interrupting?
6 THE COURT: I'll note it.
7 Q Next, "You propose to subject all presently
8 used substances to this testing and review,
9 with those found to be a threat to health
10 immediately removed from cigarettes."
11 Did they agree in that?
12 A No.
13 Q Next, "Develop a procedure by which new
14 substances may be tested and reviewed."
15 Did they agree to that?
16 A No, they did not.
17 Q Doctor, with reference to the Frank
18 Statement in 1954 that we talked about,
19 where the industry said, "We always have and
20 always will cooperate closely with those
21 whose task it is to safeguard the public
22 health," did the industry cooperate with you
23 on the issue of additives in cigarettes?
24 A No, they did not.
25 Q Your Honor, I'd like next to discuss with

3324

1 the doctor a document that's in evidence,
2 Plaintiffs' Exhibit 284.
3 MR. MOTLEY: Judge, here's a
4 limiting instruction for 284.
5 THE COURT: Thank you. The
6 document you have, ladies and gentlemen, was
7 admitted only as to Defendant Brown &
8 Williamson Tobacco Corporation.
9 Q Dr. Richmond, turning your attention to
10 Exhibit 284, September 25, 1981, memo on
11 additives, I want to read a piece of it and
12 ask you a question.
13 "Pursuant to our discussion here is a
14 think piece on the additives issue.
15 Committee of Counsel meeting, September 23.
16 The positions announced at the Committee of
17 Counsel meeting on September 23 are as
18 follows: RJR, continue meetings with HSS at

19 the industry's initiation and two or three
20 meetings from now submit to HSS a list of
21 commonly used casings and flavorings which
22 would include about 30 items."

23 Dr. Richmond, from your knowledge of
24 the additives issue, would 30 items come
25 anywhere near being the entire list of what

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1 the industry was using?

2 A I wouldn't have known.

3 Q "PM, submit a list of about 50 items soon.
4 American, submit a list of the most heavily
5 used casings and flavorings at any time.
6 Lorillard, stall any disclosure by industry
7 as long as possible. Industry should
8 immediately appoint an independent panel of
9 reputable toxicologists to review a list of
10 as yet undetermined items, and L&M, stall
11 disclosure and industry should immediately
12 appoint one independent toxicologist to
13 review a list."

14 Dr. Richmond, while you were Surgeon
15 General, did the industry in effect stall
16 the disclosure of additives to you?

17 A Yes, indeed. The most I ever got was the
18 1,300 or so compounds that you had mentioned
19 earlier.

20 Q Doctor, turn back to 13678, which was your
21 letter of November 12, 1980. I'll hand it
22 back to you, sir. With reference to the
23 response on this letter, do you see at the
24 upper right-hand corner, a handwritten
25 statement, "I would ignore"?

3326

1 A Yes.

2 Q And did the industry ignore your request for
3 additives information?

4 A Yes, they did.

5 Q All right. Did each and every company
6 ignore your requests for additives
7 information?

8 A Aside from providing the two lists that
9 totalled 1,300 compounds, yes.

10 Q Doctor, let's go back now to Exhibit 284.
11 Let's turn over to the third page, about a
12 third of the way down, beginning, "The
13 following reasons oppose an industry panel
14 of toxicologists.

15 1. Products liability litigation risk
16 is increased because of the possibility that
17 the industry-appointed panel might conclude
18 that certain additives have problems.

19 2. Unnecessary because the problem
20 will go away if the industry simply
21 discloses some number of its additives.

22 The product liability litigation risk
23 position stated by Bob Northrup is based on
24 the opinion that it would be more difficult
25 to defend against adverse assessments of

3327

1 additives by an industry panel than adverse
2 assessments by HHS scientists. The
3 assessment is the same, even if the HSS

4 scientists concluded that a larger number of
5 substances were dangerous.

6 "The Northrup position is that a better
7 alternative would be company review and
8 testing of additives. If company testing
9 began to show adverse results pertaining to
10 a particular additive, the company control
11 would enable the company to terminate the
12 research, remove the additive, and destroy
13 the data."

14 Dr. Richmond, from your experience, 60
15 years as a doctor and scientist, is
16 destruction of scientific data ever
17 defensible?

18 MR. WAGNER: Objection, Your Honor.
19 It's argumentative.

20 MR. WESTBROOK: You're talking
21 about the same additives he asked for.

22 THE COURT: Overruled. You may
23 answer.

24 A Yes. Not only that, but I think it's
25 contrary to all of the history and tradition

3328

1 of science.

2 Q Dr. Richmond, when you left office as
3 Surgeon General and returned to Harvard in
4 1981, did you keep abreast generally of
5 smoking and health issues?

6 A Yes, I have.

7 Q And did your successor as a Surgeon General
8 continue to issue Surgeon General's reports
9 on smoking and health?

10 A Yes, they did.

11 Q Doctor, are you particularly aware of the
12 1986 Surgeon General's Report on Smoking and
13 Health?

14 A Yes. That was rendered during Dr. Koop's
15 tenure.

16 MR. WESTBROOK: Your Honor, that is
17 already in evidence. It's Exhibit 50168,
18 and I have small excerpt to ask the doctor
19 about with the Court's permission.

20 THE COURT: All right.

21 Q Let me hand you several pages of 50168,
22 which is an excerpt from the report of the
23 Surgeon General, 1986. Dr. Richmond, I
24 wanted to ask you to turn, if you would,
25 sir, to the very -- second page of the

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1 document under the forward about a third of
2 the way down where it says, "After careful
3 examination of the available evidence, the
4 following overall conclusions can be:
5 Reached:

6 No. 1. Involuntary smoking is a cause
7 of disease including lung cancer in healthy
8 smokers."

9 Do you see that, Doctor?

10 A In healthy nonsmokers.

11 Q Healthy nonsmokers. Is that a conclusion
12 with which you agree?

13 A Yes, I do.

14 Q Doctor, let's move up a few years and take a

15 look at another document that's in evidence,
16 Exhibit 50234, which is the EPA Report on
17 Involuntary Smoking.

18 MR. WESTBROOK: Your Honor, that
19 has been admitted.

20 Q Dr. Richmond, are you familiar with the EPA
21 report --

22 A Yes, I am. Yes, I am.

23 Q -- on passive smoking, as it's called?
24 Let's look at the summary and conclusions,
25 Doctor, of that report on page 3.

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1 "Major Conclusions: Based on the
2 weight of the available scientific evidence,
3 the U.S. Environmental Protection Agency,
4 EPA, has concluded that the widespread
5 exposure to environmental tobacco smoke,
6 ETS, in the United States presents a serious
7 and substantial public health impact. In
8 adults, ETS is a human lung carcinogen."

9 Do you agree with that, sir?

10 A Yes, I do.

11 Q What does lung carcinogen mean?

12 A Means that it is a cancer-causing substance.

13 Q Is there any doubt in your mind, Doctor, as
14 you sit here, that ETS is a human lung
15 carcinogen?

16 A No, there is not.

17 Q Doctor, if we could just turn back for a
18 minute to the 1986 Surgeon General's Report.
19 Do you still have that up there, sir? That
20 was the one we were just looking at.

21 A Yes.

22 Q In the forward, right above the conclusion
23 that we were discussing, there's a paragraph
24 that states, "The current report, the health
25 conspiracies of involuntary smoking,

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1 examines the evidence that even the lower
2 exposure to smoke received by the nonsmoker
3 carries with it a health risk. Use of the
4 term 'involuntary smoking' denotes that for
5 many nonsmokers, exposure to ETS is the
6 result of an unavoidable consequence of
7 being in proximity to smokers."

8 Do you see that, sir?

9 A That's correct.

10 Q Doctor, from your experience over the years,
11 is it true that many nonsmokers are
12 unavoidably exposed to ETS?

13 A Yes, that's true.

14 Q Dr. Richmond, based on your almost 60 years
15 of experience, your tenure as a Surgeon
16 General of the United States, your continued
17 reading and writing on the subject and your
18 interactions with numerous scientists over
19 the years, do you have an opinion, sir, as
20 to whether secondhand smoke causes lung
21 cancer in nonsmokers?

22 A Yes, I do.

23 Q Is there any doubt in your mind about that?

24 A No, there is not.

25 Q And does it cause lung cancer in nonsmokers?

1 A Yes, it does.
2 MR. WESTBROOK: Thank you, sir.
3 Pass the witness, Your Honor.
4 THE COURT: Cross-examination,
5 Counselor?
6 CROSS-EXAMINATION
7 BY MR. OHLEMEYER:
8 Q Dr. Richmond, my name is Bill Ohlemeyer. I
9 represent some of the companies the
10 plaintiff in this case has sued. We've not
11 met before; correct?
12 A That's correct.
13 Q Let me ask you a couple questions about
14 ingredients in cigarette ingredients. Am I
15 correct, Doctor, that before you became
16 Surgeon General, the government, the United
17 States government, had regulated certain
18 aspects of the cigarette industry in this
19 country?
20 A Yes.
21 Q In fact, the government's involvement in
22 regulation of cigarettes goes back almost to
23 the turn of the century, when they broke up
24 what was called the Tobacco Trust; isn't
25 that right?

1 A That's correct.
2 Q And what the government did back then was
3 take a big tobacco company and break it into
4 smaller companies; right?
5 A That's correct.
6 Q They did that to increase competition in the
7 cigarette industry, didn't they?
8 MR. WESTBROOK: This isn't an
9 antitrust case. I don't know what this has
10 to do with my direct.
11 THE COURT: Overruled. Go ahead.
12 Q Isn't that right, Doctor?
13 A Well, I presume that that was the objective
14 of the action.
15 Q Now, you've been involved in government
16 service for some period of time; isn't that
17 right?
18 A That's correct.
19 Q And am I correct in this country the
20 government is a government of limited
21 powers; isn't that right?
22 A Well, that's a reasonable statement.
23 Q Well, let me be a little more specific.
24 A It's a government of laws.
25 Q That is to say that the government can only

1 do what the law says it can do; right?
2 A That's correct.
3 Q And the government has a role to play in
4 making those laws; isn't that right?
5 A Well, the people play that role through
6 elected officials, yes.
7 Q Correct. And those elected officials are
8 part of what's called the legislative
9 branch, right, of the government?
10 A That's correct.

11 Q What you did for the Public Health Service
12 was part of the executive branch of the
13 government; right?
14 A That's correct.
15 Q And when laws get passed by the legislative
16 branch of the government, citizens and
17 members of the executive branch have the
18 opportunity to make their views known on
19 certain subjects; isn't that right?
20 A Yes, that is correct.
21 Q And when one or the other branch of the
22 government does something that people agree
23 with or disagree with, they have the right
24 to make their views known, don't they?
25 A Yes. That's -- I think what's in the public

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1 domain is knowledge, yes.
2 Q And as part of the government, you have the
3 right and the ability to point out where you
4 think other groups of people are correct or
5 incorrect when they express those views,
6 don't you?
7 A That's correct.
8 Q Now, am I correct when you were the Surgeon
9 General there was no law that allowed the
10 government to regulate or to -- well, strike
11 that.

12 What was the state of law as it related
13 to cigarette ingredients in 1979 when you
14 were the Surgeon General?

15 A The law essentially was only one related to
16 the labeling.

17 Q What goes on the packages?

18 A Tobacco products, that's correct.

19 Q And that law had to do with the health
20 warnings that were placed on those packages?

21 A That's correct.

22 Q Now, there came a point in time, though,
23 where a law was passed that did require the
24 government to look at the issue of cigarette
25 ingredients; isn't that right?

3336

1 A That's correct.

2 Q And before that, the things that were added
3 to tobacco when people made cigarettes were
4 described in some publicly available papers;
5 isn't that right?

6 A I'm not quite sure what you're driving at.

7 Q Well, for example, in the letter that
8 Mr. Westbrook asked you about, it says that
9 the Reynolds people sent you a monograph
10 entitled, "Tobacco Flavoring for Smoking
11 Products." That was a paper that you or
12 anyone else could have gone to the library,
13 I guess, and gotten that had a list of
14 things people commonly use or add to tobacco
15 when they make cigarettes; right?

16 A That's correct.

17 Q It wasn't the recipe for how to make a
18 Marlboro or a Camel, was it?

19 A Well, that's correct, but what I was trying
20 to find out in the interest of public health
21 is what did go into a Marlboro or a Camel.

22 Q You wanted the recipe.
23 A No, I didn't want the recipe. I wanted the
24 specific substances that people were
25 consuming in the interest of the public's

3337

1 health.

2 Q And there were some concerns expressed to
3 you about the ability of your office to
4 protect the confidentiality of that kind of
5 information as trade secrets; right?

6 A That's correct.

7 Q And you had -- you actually consulted with
8 the lawyers for the Department to determine
9 whether you could safeguard the
10 confidentiality of that information; right?

11 A Yes, we did.

12 Q Now, in other countries at that time there
13 were lists of things that the government
14 allowed or prevented people from adding to
15 tobacco products; isn't that right?

16 A Well, I'm not sure that I would have been
17 familiar with all of the laws of other
18 countries.

19 Q Well, it says in this Exhibit 13678 that the
20 Reynolds people -- no, two companies also
21 made mention to you of another list
22 entitled, "List of Permitted Additives to
23 Tobacco Products issued by Britain's
24 Independent Scientific Committee on Smoking
25 and Health."

3338

1 A That's right. They provided me with that
2 list. That was the Hunter Commission List.

3 Q Correct. Now, there came a point in time
4 where the Department of Health and Human
5 Services required the companies to submit a
6 list of everything that gets added to
7 tobacco in the manufacture of cigarettes;
8 isn't that right?

9 A That's correct.

10 Q And the law requires the Department of
11 Health and Human Services to issue a report
12 to Congress about any of those ingredients
13 or additives that it feels are problematic;
14 isn't that right?

15 A Well, I'm not sure what law you're referring
16 to.

17 Q Well, are you aware of any report that the
18 Department of Health and Human Services has
19 issued since it has obtained these lists
20 that points out that any of these
21 ingredients, as they are used or in the
22 amounts they are used in the manufacture of
23 cigarettes, present health problems?

24 A Well, there couldn't be, because to this day
25 no cigarette company, other than very

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1 recently Liggett, has ever indicated which
2 of those 1,300 odd chemicals are in any
3 given cigarette.

4 Q Do you know if the Department of Health and
5 Human Services has asked anyone to tell them
6 what the recipe is for any particular

7 cigarette?
8 A Well, I personally asked the
9 representatives, the legal representatives
10 of the industry, Covington & Burling when
11 they met in my office with me. I pointedly
12 asked them what was going into individual
13 cigarettes.
14 Q But my question, Doctor --
15 A 1,300 compounds didn't help.
16 Q Let me back up. Do you know how that
17 information is provided to the Department of
18 Health and Human Services?
19 A It's provided by the industry.
20 Q And do you know how those compounds are
21 listed? Are they listed on a weight basis
22 or a usage basis?
23 A They're just listed.
24 Q Are you sure about that?
25 A No, I'm not positive, but during my time
3340

1 they were just listed.
2 Q Do you know whether the list that's provided
3 to the Department of Health and Human
4 Services breaks down the list by how --
5 which of those compounds are used in what
6 amounts?
7 A No, I don't know that.
8 Q So you don't know whether --
9 A Well, first, let me say they have never
10 specified which compounds are going into
11 cigarettes.
12 Q They have complied with the law as you know
13 it, haven't they?
14 A No. They've only given that total list.
15 Q And the law only requires them to give that
16 total list, doesn't it?
17 A That's correct.
18 Q And --
19 A But I'm saying we don't know what goes into
20 individual cigarettes and we don't know
21 which compounds the cigarette companies are
22 putting into the cigarettes.
23 Q Has the Department of Health and Human
24 Services ever indicated or suggested, to
25 your knowledge, that if any one or more of
3341

1 those compounds were removed from a
2 cigarette, that the cigarette would be less
3 hazardous or safe to use?
4 A Well, they couldn't because they've not been
5 told which of those compounds, which of
6 those compounds are in the cigarettes. How
7 could they ask for a specific compound if
8 they don't know which are in the cigarettes?
9 And companies have never been willing to
10 reveal what compounds they go -- go into
11 specific cigarette brands.
12 Q They have a list of every compound that gets
13 added to tobacco in the manufacture of
14 cigarettes; right?
15 A Total list. There is no specification of
16 individual compounds.
17 Q And to date, the Department of Health and

18 Human Services has not said word one about
19 any one of those compounds as they're used
20 in the manufacture of cigarettes?
21 A Well, I asked them when I was Surgeon
22 General, yes.
23 Q I know. But since then, Doctor, the
24 Department of Health and Human Services has
25 opened an Office on Smoking and Health;

3342

1 isn't that right?
2 A No. That existed before.
3 Q That office gets this list every year,
4 doesn't it?
5 A That's correct.
6 Q And, in fact, that list has been made
7 available to the public over the last three
8 or four years, hasn't it?
9 A No, but the list of what people are smoking
10 is not known to the public.
11 Q Right. Can you tell me, Doctor --
12 A Out of the 1,300 compounds, you can't tell
13 me to this day, because no representative of
14 industry has ever either affirmed or denied
15 that shellac is going into cigarettes.
16 Q And the Department of Health and Human
17 Services has never issued a report that says
18 if shellac is in cigarettes, that's a
19 problem, have they?
20 A No. There's no reason for them to, because
21 they don't know whether it is or it isn't.
22 Q And quite frankly, the Department of Health
23 and Human Services doesn't know what's in a
24 can of Coke, either, do they?
25 A Oh, yes, they do.

3343

1 Q They know there is water and flavors?
2 A Right.
3 Q But they don't know what those flavors are,
4 do they?
5 A Well, if they thought that any of those were
6 potentially harmful, they would ask for
7 them.
8 Q They'd say something about it, wouldn't
9 they?
10 A That's right.
11 Q Now, the Tobacco Institute is not some kind
12 of secret organization, is it?
13 A Well, in retrospect, considering some of the
14 documentation of what they did, it was
15 pretty secret in terms of how they planned
16 to attack our 1979 report.
17 Q They have an office in Washington.
18 A Yes.
19 Q They have their name on the door.
20 A Yes.
21 Q They're in the phone book.
22 A Right.
23 Q And you know that they are involved in
24 putting out press releases and making
25 statements to the press about matters that

3344

1 affect the growing of tobacco and the
2 manufacture and sale of cigarettes; right?

3 A But I think in the documents which I was
4 shown today, I think it's very clear that
5 they carried on a campaign of misinformation
6 in relationship to the report that we were
7 to present, even before the report was
8 available.

9 Q Well, I'm a little confused about that,
10 Doctor. Are you telling the jury that
11 somebody at the Tobacco Institute stole a
12 copy of your '79 Surgeon General's Report?

13 A Well, it was obtained irregularly in some
14 way.

15 Q And you --

16 A They were certainly not entitled to have a
17 copy.

18 Q You're convinced that nobody in the press
19 gave them a copy?

20 A No. I can't tell you where it came from.
21 But they knew that the document was not to
22 be available until our press conference on
23 January 11th.

24 Q In fact, you gave copies of the report to
25 members of the press a day early so they

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1 would have some time to write stories about
2 it?

3 A That's correct.

4 Q And did your office --

5 A Those were credentialized press people.

6 Q Did your office have a press secretary to
7 handle that?

8 A Our Office on Smoking and Health had, yes.

9 Q And they put out press releases from time to
10 time?

11 A They don't. The Secretary or the Assistant
12 Secretary and Surgeon General do.

13 Q The purpose of the press release is to make
14 something available to the media so that
15 they can publicize it?

16 A For educational purposes. It's not
17 publicizing it. It's for educational
18 purposes.

19 Q Now, the fact of the matter is, almost every
20 organization -- every industry in this
21 company has a trade association or an
22 industry organization, doesn't it?

23 A Yes, that's right.

24 Q The ads people you see with those milk
25 mustaches are put out by the milk industry

3346

1 or milk association?

2 A That's correct.

3 Q The people who raise and sell beef in this
4 country have an association?

5 A So we've heard recently.

6 Q They have had a little bit to say about some
7 of the more recent Surgeon General's reports
8 on diet and cholesterol, haven't they?

9 A Well, I would say not just recent. That
10 goes back a long way.

11 Q So the beef people -- well, let's put it
12 this way: The Tobacco Institute was an
13 organization that you knew was in Washington

14 and involved in making statements to the
15 press on behalf of the tobacco industry;
16 right?
17 A Oh, yes. That's correct.
18 Q And that's a pretty -- an industry can be
19 defined pretty broadly; right?
20 A That's correct.
21 Q People who farm it and sell it, grow it and
22 sell it at auction and make it into
23 cigarettes; right?
24 A That's correct.
25 Q Now, you don't deny their right to express

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1 their opinions about your opinions, do you?
2 A No.
3 Q And you certainly have the right to express
4 opinions about their opinions.
5 A Yes.
6 Q And, in fact, that's what happens in a
7 process like this; right? You have a press
8 conference, you announce your opinions and
9 your judgments, the press runs down the
10 street, asks the Tobacco Institute what they
11 think about your opinions, they run back to
12 you and say this is what they think about
13 what you think, what do you think about
14 that; right?
15 A Well, I -- but I think one can make
16 judgments about ethics. I think there is
17 something unethical about refuting a report
18 24 hours before it's released.
19 Q And that was an opinion --
20 A Particularly since they don't have a copy.
21 Q That was an opinion that you could have, and
22 I suspect might have expressed on January
23 12th of 1979; right?
24 A January 11th.
25 Q January 11th.

3348

1 A Right.
2 Q Take a look -- do you still have in front of
3 you the portion of the '79 Surgeon General's
4 Report that Mr. Westbrook gave you? I think
5 it's marked Exhibit 50161, sir.
6 A That's correct. I have it.
7 Q You see the portion there that says the
8 Secretary's Forward?
9 A Yes.
10 Q Who was the Secretary of the Department of
11 Health, Education and Welfare in 1979?
12 A Joseph Califano.
13 Q And was Mr. Califano a medical doctor?
14 A No.
15 Q He wrote this forward to your report; right?
16 A That's correct.
17 Q Hand turn over there to page ii. You see at
18 the end of that first paragraph, he
19 describes smoking as slow motion suicide,
20 doesn't he?
21 A Let's see if I can find -- it's not very
22 legible here. I don't see it here, but I
23 know that's in this forward.
24 Q And I'm looking at the first paragraph

25 there, sir, on the left side of that page.
3349

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1 He also describes -- he also states that the
2 cigarette industry's own research, from
3 January '64 through December of '73 at a
4 cost of approximately \$15 million confirmed
5 the lethal dangers of cigarette smoking.

6 A That's correct.

7 Q That's his impression of what the cigarette
8 companies apparently had conducted research
9 and published the results of that research;
10 right?

11 A That's correct.

12 Q And he formed an opinion based upon his
13 review of that information.

14 A That's correct.

15 Q And he published it in the forward to your
16 Surgeon General's Report.

17 A Yes. And that's when he concludes that
18 there can be no doubt that smoking is truly
19 slow motion suicide.

20 Q Now, who did you request -- when you were
21 Surgeon General, which companies did you ask
22 to provide you with the results of any such
23 research?

24 A Well, we were constantly asking all of the
25 companies to provide results of their

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1 research.

2 Q And apparently Mr. Califano had access to
3 some of it; right?

4 A This -- he's referring to research that was
5 funded independently by the industry.

6 That's the \$15 million.

7 Q So it's money they gave to someone else to
8 conduct research.

9 A Yes. Generally the Council on Tobacco
10 Research, CTR or its predecessor, the
11 Tobacco Institute Research Council.

12 0 And according to --

13 A That's what the \$15 million was for.

14 Q According to Secretary Califano, the result
15 of that research wasn't very favorable to
16 the tobacco industry, was it?

17 A That's correct.

18 Q Now, it also says on the next page there
19 that in a free society research and
20 education must be the major tools of any
21 public health program to deal with smoking.

22 A Yes.

23 0 You recall that?

24 A Yes.

25 Q And it talks on the bottom of the page about 3351

3351

1 per capita cigarette consumption. Do you
2 see that? Right there at the bottom of that
3 page, it says little iii, three times.

4 Now, am I correct, Dr. Richmond, that
5 between 1964 and 1979, the public health
6 community and the Public Health Service did
7 launch a research and education campaign
8 that dealt with the risks associated with
9 smoking; isn't that right?

10 A That's correct.
11 Q In fact, it says on the next page that the
12 record suggests that every time government
13 and voluntary agencies have intensified
14 their efforts to spotlight the risk of
15 smoking, more smokers have given up the
16 habit and decided not to take it up.
17 A That's correct.
18 Q And, in fact, between 1964 and 1979, the per
19 capita consumption of cigarettes decreased
20 in this country; right?
21 A That's correct.
22 Q What does that mean?
23 A That means that the educational efforts were
24 having an impact. And it also means further
25 that the truth is eloquent. As the

3352

1 scientific truths became available, the
2 public began to believe.
3 Q Am I correct --
4 A And began to change its behavior.
5 Q And the percentage of the population that
6 smokes cigarettes decreased between 1964 and
7 1979?
8 A That's correct.
9 Q Am I also correct that between 1964 and 1979
10 there were health warnings added to
11 cigarette packages by act of Congress?
12 A That's correct.
13 Q And that would have been in --
14 A 1966.
15 Q And then again in '69 and '84, even; right?
16 A That's correct.
17 Q Am I correct also that between '64 and '79
18 there were restrictions on television
19 advertising for cigarettes that were enacted
20 in the law; right?
21 A Yes.
22 Q TV ads were banned.
23 A That's correct.
24 Q Is it fair to say that between '64 and '79
25 restrictions on public smoking increased?

3353

1 A Well, the data on that are -- are not
2 terribly firm.
3 Q We'll talk about that in a second then.
4 Am I correct that between '64 and '79
5 tobacco companies -- by 1979, tobacco
6 companies were held in lower esteem by
7 society than they were in 1964?
8 A Well, that's a matter of judgment, but
9 that's a fair statement.
10 Q Is that another way of saying people paid
11 less attention to what they had to say on
12 this subject by this time than they had in
13 1964?
14 A Well, I think there were issues about
15 credibility, yes.
16 Q Now, a few pages later there's a preface
17 that appears to be written by you; is that
18 right?
19 A That's correct.
20 Q Will you turn to page -- the page that says,

21 "The changing cigarette product."
22 A Yes.
23 Q Am I correct, Dr. Richmond, that between
24 1964 and 1979, that the average amount of
25 tar and nicotine in a cigarette declined?
3354
1 A Yes. That's right.
2 Q That's sometimes known as tar and nicotine
3 delivery?
4 A That's correct.
5 Q And the consumption of filter tipped
6 cigarettes rose rapidly; right?
7 A That's correct.
8 Q And, in fact, it says here in 1966, the
9 Public Health Service, that's the
10 government; right?
11 A Right. I'm trying to see where you're
12 reading.
13 Q I'm sorry. See the paragraph that begins,
14 "Since then"?
15 A Yes, that's right.
16 Q That's the third paragraph. It says, in
17 that year, 1966, the Public Health Service
18 issued its finding that, "the preponderance
19 of scientific evidence strongly suggests
20 that the lower the tar and nicotine content
21 of a cigarette, the less harmful will be the
22 effect."

23 Now, shortly thereafter then the
24 Federal Trade Commission required the
25 measurement in the reporting of tar and
3355
1 nicotine deliveries in cigarette
2 advertisements; isn't that right?
3 A That's correct.
4 Q So at least by 1966 there was some thought
5 that if you reduced the amount of tar and
6 nicotine delivered by a cigarette, it might
7 be less harmful.
8 A Yes, that's correct.
9 Q And, in fact, the decline in tar and
10 nicotine delivery that resulted was a result
11 of important changes in cigarette production
12 technology; isn't that right?
13 A That's correct.
14 Q And that included the development of
15 something called tobacco sheet
16 reconstitution?
17 A Yes. That's right.
18 Q Improvements in cigarette filtration?
19 A Correct.
20 Q Improvements in cigarette paper?
21 A That's correct.
22 Q Genetic manipulation of tobacco strains?
23 A Right.
24 Q Increased use of plant stems and other
25 tobacco portions formerly regarded as waste;
3356

1 right?
2 A That's correct.
3 Q And all of those changes in technology were
4 created by or put into place by cigarette
5 companies, not the government; right?

6 A That's correct.
7 Q So we can call that industry-sponsored
8 technology occurred during this time period;
9 right?
10 A That's correct.
11 Q And the word is "improvements," right,
12 that's used there.
13 A Well, what that doesn't take into account,
14 however, is what smokers did to compensate
15 for the lower yields.
16 Q We'll get to that in a minute. And, again,
17 on the other side of that page it says there
18 is substantial experimental evidence and
19 some supporting data from retrospective
20 studies that cigarettes with reduced tar and
21 nicotine delivery should in principle have
22 reduced the risk of health hazards; right?
23 A That's correct.
24 Q Now, about this same time, the National
25 Cancer Institute was sponsoring something

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1 called the Tobacco Working Group; isn't that
2 right?
3 A That's correct.
4 Q And that was a Department of Health,
5 Education and Welfare committee; right?
6 A That's correct.
7 Q That brought together members of the
8 government; right?
9 A That's correct.
10 Q Members of the tobacco industry?
11 A That's correct.
12 Q And some scientists who had done some
13 research in other areas in smoking and
14 health?
15 A That's right.
16 Q And the purpose of that was to try to
17 develop what the National Cancer Institute
18 described as a less hazardous cigarette;
19 right?
20 A Yes, that's right.
21 Q And during this time period, that
22 organization issued reports about the
23 progress of that effort; right?
24 A That's correct.
25 Q And am I correct, Dr. Richmond, that that

3358

1 group decided that these are the kinds of
2 things, these things we've talked about
3 before, that should be put into place to
4 improve or make cigarettes potentially less
5 hazardous?
6 A Yes, that's correct.
7 Q And isn't it a fact that everything that
8 group recommended had already been achieved
9 and put into the marketplace by the
10 cigarette industry before it was
11 recommended?
12 A No, I'm not sure of that. Because the group
13 continued to work and continued to make
14 recommendations and continued to explore
15 with industry whether more rapid progress
16 could be made, so its work was never done,

17 and I would not say that industry was ever
18 in advance of what the thinking was in that
19 working group.
20 Q Well, let's put it this way: Did the group
21 ever make a recommendation of something that
22 could be or should be done to a cigarette
23 that wasn't done or being done already?
24 A Well, I think that its recommendations were
25 in the public domain, so that it's

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1 reasonable to assume that if the tobacco
2 industry thought it was in its interest,
3 that it would act on those recommendations.
4 There's nothing secret about the
5 deliberations of that working group; it was
6 in the public domain.
7 Q Now, near the end of your preface it says
8 that, "The decision to smoke is a personal
9 decision, but once this is said, it remains
10 unquestionably the responsibility of health
11 officials to ensure that smokers and
12 potential smokers are adequately informed of
13 the hazards of smoking."

14 Do you see that there on the bottom of
15 page 14.

16 A These numbers are --

17 Q It's xiv, I think.

18 A The numbers are not on this copy.

19 Q You see the page where your name with it,
20 where it says, January 11?

21 A Right. Right.

22 Q Just to the left of that where it says
23 public policy?

24 A Okay. Yeah. That's right.

25 Q And then it says, just a sentence later that

3360

1 the consideration of what is meant by,
2 "adequately informed," is a scientific and
3 public health policy problem; right?

4 A That's correct.

5 Q And in this country, Congress has made a
6 decision about what should be put on
7 cigarette packages in order to adequately
8 inform the public about the potential risk
9 of smoking; isn't that right?

10 A That's correct.

11 Q Dr. Richmond, am I correct that the first --
12 strike that.

13 Let me back up. Are you familiar with
14 a publication known as the Harvard Health
15 Talks?

16 A Harvard Health Talks? No. I know the
17 Harvard Health Letter.

18 Q Do you know if the Harvard Health Talks were
19 a predecessor to the Health Letter?

20 A No, I don't.

21 Q Do you know what, if anything, has been
22 written about environmental tobacco smoke or
23 sidestream smoke prior to 1964?

24 A No, I don't think I have any specific
25 recollection.

3361

1 Q Do you know whether the issue of

2 environmental tobacco smoke or sidestream
3 smoke was discussed in connection with
4 potential risks to health in medical
5 journals prior to 1964?
6 A No.
7 Q Am I correct that in 1971, the United States
8 Public Health Service conducted a study on
9 the health aspects of smoking in transport
10 aircraft? You recall that?
11 A Yes, I'm aware of that.
12 Q So before the Surgeon General ever said a
13 word in a Surgeon General's report about the
14 health consequences of exposure to other
15 people's smoke, there had been a report
16 conducted by the Public Health Service on
17 the health aspects of smoking in airplanes;
18 right?
19 A That's correct.
20 Q And the government and other agencies were
21 taking steps to protect the rights of others
22 in public places before 1972; isn't that
23 right?
24 A Well, local governments were.
25 Q Well, let me --

3362

1 THE COURT: Counselor, I'm going to
2 stop you right now. We're going to take a
3 short break. We've been going a little over
4 two hours, Doctor, we're going to take a
5 break for 15 minutes. You may step down.
6 (Standard admonition)
7 MR. CASSELL: All rise.
8 (A brief recess was taken.)
9 MR. CASSELL: All rise.
10 THE COURT: Be seated. Jury is
11 back together with alternates.
12 MR. WESTBROOK: I'll go get the
13 witness.
14 THE COURT: All right. Just have a
15 seat, Doctor. For the record, would you
16 again state your name, sir.
17 THE WITNESS: Julius B. Richmond.
18 THE COURT: All right.
19 Mr. Ohlemeyer?
20 MR. OHLEMEYER: Thank you, Your
21 Honor.
22 BY MR. OHLEMEYER:
23 Q Dr. Richmond, I'm correct that your medical
24 specialty is pediatrics?
25 A That's correct.

3363

1 Q And the publications that you told the jury
2 about would for the most part be in your
3 area of specialty?
4 A A great many of them, but many of them are
5 in the area of public health and public
6 policy.
7 Q And am I correct that you've not conducted
8 any research on environmental tobacco smoke,
9 per se?
10 A That's correct.
11 Q The publications you described don't
12 describe research you conducted on

13 environmental tobacco smoke.
14 A That's correct.
15 Q Tell us again what Joseph Califano's title
16 was when you were Surgeon General?
17 A Secretary of the Department of Health
18 Education and Welfare.
19 Q Was he your boss, more or less?
20 A That's correct.
21 Q What kind of medical doctor was Joe
22 Califano?
23 A He was not a physician.
24 Q What was his training and his education?
25 A He's a lawyer.

3364

1 Q Mr. Califano was a lawyer.
2 A That's correct.
3 Q Now, am I correct, Dr. Richmond, that in
4 1972, the Surgeon General's report concluded
5 that an atmosphere contaminated with tobacco
6 smoke can contribute to discomfort of many
7 individuals but that the extent to which
8 environmental tobacco smoke might cause
9 disease in humans was unknown.
10 A In 19- --
11 Q '72.
12 A Whose report was that?
13 Q Well, I'm not sure. Would it have been
14 Surgeon General Steinfeld?
15 A Could have been.
16 MR. OHLEMEYER: If the Court
17 please, I'll hand the witness an excerpt.
18 THE COURT: All right.
19 Q Let me hand you, Dr. Richmond, a copy, or
20 excerpt from the 1972 Surgeon General's
21 Report, page 131, where it says, Summary,
22 there's a discussion, a brief discussion of
23 environmental tobacco smoke; isn't that
24 right?
25 A That's correct.

3365

1 Q And the summary, the conclusion is that it's
2 irritating? Or does it say annoying?
3 A Can contribute to the discomfort of many
4 individuals.
5 Q Discomfort. But the effect, or the extent
6 to which that discomfort might cause illness
7 was not known at that time; right?
8 A That's correct.
9 Q Now, at that point in time -- I'll take
10 that. Thanks. At that point in time, the
11 government and commercial agencies were
12 taking steps to restrict smoking in public
13 places, weren't they?
14 A At the local and state level.
15 Q In fact, the nation's capitol, by 1972,
16 smoking in the nation's capitol was
17 prohibited in the Supreme Court, federal
18 courts, House of Representatives, federal
19 museums, libraries and presidential press
20 conferences; do you recall that?
21 A Yes. But not in all federal buildings at
22 that time.
23 Q That's fair enough. Then the Surgeon

24 General again looked at the issue of
25 environmental tobacco smoke in 1975; isn't
3366

1 that right?

2 A That's correct.

3 Q And am I correct that in 1975, the Surgeon
4 General again concluded that the effects of
5 cigarette smoke on healthy nonsmokers
6 consists mainly of minor eye and throat
7 irritation but there was no judgment made
8 about whether it was a cause of illness or
9 disease?

10 A That's correct.

11 Q And then there came a point in time in -- by
12 the way, environmental tobacco smoke
13 certainly is annoying and irritating to most
14 nonsmokers, isn't it?

15 A Yes, it is.

16 Q You don't know anybody who likes to be
17 around environmental tobacco smoke, do you?

18 A No. I know I don't.

19 Q In 1979, then the conclusions of the '75
20 report were essentially repeated as it
21 relates to environmental tobacco smoke.

22 A Well, that's right, except that by then we
23 were beginning to be aware of the potential
24 hazards of environmental tobacco smoke, and
25 that's why I recommended in my '79 report

3367

1 that we ought to engage in further research
2 on the issue. I wouldn't have recommended
3 that if we didn't suspect that it was a real
4 health hazard.

5 Q And what it said in that report was that
6 attention to involuntary smoking is of
7 recent vintage and only limited information
8 regarding the health effects, such as
9 exposure upon the nonsmoker was available;
10 therefore, research was needed.

11 A That's precisely my point.

12 Q So your point was that you had some
13 suspicions about ETS; right?

14 A Well, it was more than suspicion. Data were
15 accumulated to suggest that there were
16 health hazards.

17 Q Data suggested. But more research was
18 needed before any judgments could be formed;
19 right?

20 A That's correct.

21 Q And then the 1982 Surgeon General's Report
22 was the next one that looked at the issue;
23 right?

24 A Yes, that's correct.

25 Q Was that after you had left office?

3368

1 A Yes, that was.

2 Q And the 1982 report described some
3 epidemiology studies that had been published
4 on the subject; right?

5 A That's correct.

6 Q And that included the Hirayama study?

7 A That is correct.

8 Q The Trichopolous study; right?

9 A Right.
10 Q And I think something, the Garfinkel study;
11 right?
12 A That's right.
13 Q And we referred to these previously as a
14 study that was conducted in Japan, one in
15 Greece, and one in the U.S.
16 A That's right.
17 Q Recall that? Now, the '82 report concluded
18 that the data from those studies was limited
19 as a result of the design and the execution
20 of those studies; right?
21 A Well, that's right, but what was striking
22 was the convergence of those studies. When
23 you have multiple studies done in different
24 ways and they all suggest the same
25 conclusions, the inference can be made that

3369

1 there is an effect.
2 Q But you agree with me that the '82 Surgeon
3 General Report said that the data from these
4 studies had some limitations --
5 A Well, I think that could be said of any
6 scientific study at any time.
7 Q But it was specifically --
8 A But those data, there was a convergence of
9 the terms of their conclusions.
10 Q I understand that, Doctor, but wasn't it
11 specifically stated in the '82 report that
12 the data from these three studies was
13 limited?
14 A Yes, but as I say, that's a generalization
15 that could be made of any scientific study.
16 One scientific study only leads to further
17 scientific studies.
18 Q And the Surgeon General in '82 did not
19 conclude that exposure to environmental
20 tobacco smoke caused lung cancer in adults
21 based on those studies, did he?
22 A No, but that's why a subsequent Surgeon
23 General's report on environmental tobacco
24 smoke came into being. That was published
25 in '86.

3370

1 Q But you would agree with me that in '82 that
2 was the Surgeon General Koop; right?
3 A That's correct.
4 Q That Dr. Koop --
5 A It was in '86, too.
6 Q Dr. Koop said in '82 the limitations in data
7 and study design of those three studies did
8 not allow a judgment about causality at that
9 time?
10 A At that time, that was a reasonable
11 statement.
12 Q And, in fact, that conclusion was shared by
13 other individuals including people not
14 employed by or connected to the tobacco
15 industry; isn't that right?
16 A People were beginning to converge on this
17 problem, and they were seeking more data.
18 That's why further studies were designed and
19 carried out.

20 Q So then there were reports in '83, '84, and
21 '85; isn't that right?
22 A That's correct.
23 Q And none of them said anything about
24 environmental tobacco smoke; right?
25 A That's correct.

3371

1 Q And then we've heard about the '86 report.
2 Right?
3 A That's correct.
4 Q And the '86 report was focused, the subject
5 was the health consequences of involuntary
6 smoking; right?
7 A That's correct.
8 Q And it was the first Surgeon General's
9 report to conclude that living with a smoker
10 might cause cancer in nonsmoking women;
11 right?
12 A That's correct.
13 Q And the conclusions in that report were
14 based in large part upon epidemiology
15 studies including those three studies;
16 right?
17 A That's correct.
18 Q And am I correct that the '86 report
19 acknowledged that there was limited and
20 inconclusive evidence about the effects of
21 exposure to environmental tobacco smoke in
22 the workplace?
23 A Well, I'd have to see the wording before I
24 could make a judgment about that.
25 Q If you'll give me a second, sir, I'll find

3372

1 it.
2 Page 91 of the '86 -- may I approach,
3 Your Honor?

4 THE COURT: Yes.
5 Q There's a section on co-worker smoking;
6 isn't that right?
7 A Yes, I see the quote that you had.
8 Q And it says there that those studies, the
9 studies we've talked about, didn't really
10 deal with the workplace; right?
11 Let me back up.
12 A Yes, they -- they said it was not considered
13 in the early studies on involuntary smoking.
14 Q And it also said that it might be a source
15 of exposure to environmental tobacco smoke
16 that ought to be considered; right?
17 A That's correct.
18 Q But it says and acknowledges that there's
19 limited and inconclusive evidence about the
20 effects of exposure to environmental tobacco
21 smoke in the workplace; right?
22 A Yes, but it then goes on to cite some of the
23 studies that do show some relationships.
24 Q But at that point in time, the Surgeon
25 General described those studies as limited

3373

1 and inconclusive, didn't he?
2 A Yes, but it then goes on to discuss the
3 studies.
4 Q Those studies. True?

5 A Yes. And some were significant and some
6 weren't.

7 Q Now, am I correct, Dr. Richmond, that no
8 subsequent Surgeon General's report has
9 dealt with the subject of environmental
10 tobacco smoke since 1986?

11 A That's correct.

12 Q And am I correct, Dr. Richmond, that there
13 are experienced scientists, people who are
14 familiar with issues of smoking and health,
15 who even today have some doubts about the
16 relationship or the association between
17 environmental tobacco smoke and the
18 subsequent development of lung cancer in
19 nonsmokers?

20 A Well, if there are, I'm not aware of them.

21 Q Are you familiar -- are you familiar with an
22 individual by the name of Ernst Wynder?

23 A Yes.

24 Q Who is Ernst Wynder?

25 A He was, may still be, the director of an
3374
1 organization, I think, known as the American
2 Health Foundation.

3 Q And is that part of the National Institute
4 of Health?

5 A No. No. It's a private entity.

6 Q Where does it get most of its funding?

7 A From a variety of sources. Foundations.

8 Q Including the government?

9 A Yes. Oh, yes.

10 Q And who is Geoffrey Kabat?

11 A I don't know.

12 Q If I told you he was in the Department of
13 Epidemiology and Social Medicine at the
14 Albert Einstein College of Medicine in the
15 Bronx, would that refresh your recollection?

16 A Yes.

17 Q In fact, if I told you that he was a member
18 of the Scientific Advisory Board that
19 advised the EPA on their risk assessment of
20 passive smoking, does that refresh your
21 recollection?

22 A Yes, that's reasonable.

23 Q Let me hand you, Doctor, an article that
24 appeared in the American Journal of
25 Epidemiology and it was published in 1995,
3375
1 Doctor, written by Dr. G. Kabat and
2 Dr. Wynder. Would you read the last
3 paragraph for us on page 147 above the word,
4 "Acknowledgment."

5 A "While an association between exposure to
6 environmental tobacco smoke and lung cancer
7 in never smokers has compelling biological
8 plausibility, and potentially important
9 public health implications, the methodologic
10 difficulties confronting these studies and
11 the inconsistencies in their results
12 illustrate the difficulty in using
13 epidemiologic methods to establish and
14 verify small risks."

15 Q Let me ask you, Doctor, if these studies

16 were epidemiological studies?
17 A Yes, they were.
18 Q And for the most part, the evidence
19 described by the Surgeon General in the '86
20 report consisted of epidemiological
21 evidence, didn't it?
22 A That's correct.
23 Q And as a medical doctor, do you know what,
24 or does the reference to small relative risk
25 mean anything to you?

3376

1 A Yes.
2 Q What does that mean?
3 A This says small excess risks.
4 Q What does small excess risk mean?
5 A Risks beyond the usual.
6 Q But in terms of small, does that mean
7 typically below 2 or below 3?
8 Let me back up, Doctor. Do you know
9 what epidemiologists, or how they use the
10 phrase relative risk?
11 A Yes.
12 Q What's a relative risk?
13 A Relative risk is the difference between the
14 risk in an exposed population versus an
15 unexposed population to a risk factor.
16 Q Do you know what they mean when they
17 describe that risk as small-excess risk?
18 A Yes. It means that it's not, has greater
19 consequences if it's a large-excess risk.
20 Q And isn't it fair to say that the closer
21 that risk comes to 1, the smaller it is --
22 A That's correct.
23 Q -- the more likely it is to result from
24 either bias or confounding or mistake the
25 study that produced it?

3377

1 A Well, that would mean, yes, that there was
2 no risk.
3 Q Doctor, I just have a few more questions for
4 you.
5 A I think, however, I don't read this
6 paragraph in the same way that you do. They
7 indicate that there are methodologic
8 problems, but they don't say there is no
9 relationship between environmental tobacco
10 smoke and lung cancer in nonsmokers.
11 Q Go ahead and take a look at the first page
12 of that study.
13 A They say this has compelling biological
14 plausibility and potentially important
15 public health implications.
16 Q Which is another way of saying that it makes
17 sense to assume that environmental tobacco
18 smoke might create some risk to people who
19 are exposed to it; right?
20 A That's right.
21 Q That's what biologically plausible means?
22 A That's right.
23 Q But the studies, the epidemiology studies,
24 because of the way they are put together,
25 their methodology, makes it difficult to

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1 determine whether the increased risk that's
2 being observed in these studies is the
3 result of the exposure to the environmental
4 tobacco smoke or something about the study
5 that makes it difficult, if not impossible,
6 to sort all that.

7 A They make the point that these studies are
8 difficult to conduct, but I come back to the
9 fact that there's a certain convergence in
10 the results of these studies that do provide
11 plausibly a relationship between lung cancer
12 and environmental tobacco smoke.

13 Q Let me direct your attention, Doctor, to the
14 first page of that study. May I have that?
15 You see the last, the highlighted portion of
16 the abstract there, the last sentence in the
17 abstract?

18 A Yes, I do.

19 Q And read that for us.

20 A "While this study had limited sample size,
21 that's very important because I looked at
22 the numbers here, and they're very limited,
23 for a study of this nature, the pattern of
24 odds ratio shows little indication of an
25 association of environmental tobacco smoke

3379

1 with lung cancer in nonsmokers."

2 But for a subject of this nature, to
3 think that you could make any serious
4 inferences from looking at 117 male and 187
5 female never smoking controls, you know, it
6 doesn't impress me as a very well-conducted
7 study.

8 Q Those are bigger numbers, Doctor, than the
9 number of people looked at in these three
10 studies, weren't they?

11 A No.

12 Q Doctor, let me see if I understand this.
13 Dr. Wynder and Dr. Kabat are experienced
14 researchers.

15 A That's right.

16 Q They've been involved, in Dr. Wynder's case
17 in the study of smoking and health since the
18 1950s?

19 A That's correct.

20 Q Dr. Wynder and Dr. Kabat set out to do a
21 study to see if they could demonstrate an
22 association between exposure to
23 environmental tobacco smoke and the
24 subsequent development of lung cancer in
25 nonsmokers; right?

3380

1 A That's right.

2 Q And they did it after the '86 Surgeon
3 General's Report and after the EPA's risk
4 assessment was published on environmental
5 tobacco smoke; isn't that right?

6 A That's correct.

7 Q And presumably one or both of those
8 individuals are experienced or familiar with
9 how you set that kind of study up and how
10 you execute it and how you interpret the
11 data; isn't that right?

12 A That's correct.
13 Q And nonetheless --
14 A But -- but they entered into a study that in
15 my view used numbers that were too small.
16 Q You take issue with how they did their
17 study.
18 A That's right.
19 Q All right. Now, have you ever done a study
20 like this, Dr. Richmond?
21 A No, I've not. But I've reviewed many.
22 Q Let me change topics for a second, sir, and
23 finish up.
24 You're familiar generally with the
25 Council for Tobacco Research; right?

3381

1 A Yes.
2 Q And you understand that it's an organization
3 that provides funds, money, to people to
4 conduct research.
5 A That's correct.
6 Q And from time to time they have provided
7 money to institutions like the Harvard
8 Medical School.
9 A Yes.
10 Q From time to time they have co-sponsored
11 research with government agencies, that
12 is --
13 A That's true.
14 Q -- to say, they give a researcher some
15 money, and the government gives the same
16 researcher some money?
17 A (Affirmative nod)
18 Q And isn't it fair to say, Doctor, that in
19 the 1979 Surgeon General's Report that there
20 are citations or lists of research or study
21 that you and your staff read and reviewed
22 before they prepared the report?
23 A That's correct.
24 Q And am I correct, Doctor, that there are 57
25 articles cited in your Surgeon General's

3382

1 report that were sponsored by the Council
2 for Tobacco Research?
3 A I haven't counted them, but I think that
4 could be a reasonable assumption.
5 Q Including one that related to the
6 relationship between smoking and birth
7 weight in pregnant women; right?
8 A Yes, that's correct. I think they may have
9 funded one of the first studies that showed
10 a relationship between cigarette smoking and
11 low birth weight.
12 Q And it was a study that was published in
13 medical journals?
14 A In the American Journal of Obstetrics and
15 Gynecology, yes.
16 Q In 1965.
17 A That's correct.
18 Q And that was 20 some years before Congress
19 required any kind of warning to be put in
20 cigarette ads or on cigarette packages that
21 dealt with low birth weight; right?
22 A That's correct.

23 MR. OHLEMEYER: That's all I have,
24 Your Honor. Thank you.

25 THE COURT: Mr. Wagner, would you
3383

1 have any questions, sir?

2 MR. FURR: I have just a few,
3 first, Your Honor.

4 THE COURT: All right. Mr. Furr.

5 CROSS-EXAMINATION

6 BY MR. FURR:

7 Q Good afternoon, Dr. Richmond.

8 A Good afternoon.

9 Q My name is Jeff Furr. I represent the RJ
10 Reynolds Tobacco Company. And with the
11 Court's permission, I'll hand you a complete
12 copy of the '79 Surgeon General's Report
13 because I may want to ask you some questions
14 about some sections of that you don't have
15 the excerpts for up there.

16 Dr. Richmond, you told Mr. Ohlemeyer
17 that you're board certified as a
18 pediatrician; is that correct, sir?

19 A That's correct.

20 Q You're not certified in pulmonology,
21 oncology, or any other medical specialty,
22 are you, sir?

23 A No, I'm not.

24 Q You also told Mr. Ohlemeyer that you have
25 never conducted a scientific study on

3384

1 environmental tobacco smoke. Isn't it also
2 true that other than the 1979 Surgeon
3 General's Report, you've never published on
4 that topic either.

5 A I published articles on smoking and health,
6 yes.

7 Q Yes, sir. But you've never published a
8 scientific study on environmental tobacco
9 smoke, have you?

10 A No, that's correct.

11 Q Just to be clear, sir, with respect to the
12 '79 Surgeon General's Report, obviously
13 there are a lot of people involved in
14 drafting and reviewing that report, but you
15 read every word in that report and gave your
16 blessing before it was released?

17 A That's correct.

18 Q That's correct, sir. Let me ask you a few
19 questions about some sections of that
20 report.

21 The first question I'm going to ask you
22 would be with respect to a section on 551.

23 A 551?

24 Q Yes, sir.

25 A Okay.

3385

1 Q On that report, there appears a section
2 entitled "Other risk factors." You see
3 that?

4 A Right.

5 Q The first sentence reads that, "There is
6 epidemiologic evidence which links
7 pancreatic cancer with increased dietary fat

8 and protein intake."
9 Do you see that, sir?
10 A That's correct.
11 Q That association has not been disproven
12 since 1979, has it?
13 A No.
14 Q Okay. Next question I'll ask you to turn to
15 page 11-6, sir.
16 A Yes, I have it.
17 Q That page contains a section of the report
18 titled, "Constituents of Tobacco Smoke and
19 Their Absorption by the Nonsmoker"; is that
20 correct?
21 A Yes, that's correct.
22 Q And halfway down through the first paragraph
23 does the following language appear: "Many
24 of the substances including nicotine, carbon
25 monoxide and ammonia are found in much

3386

1 higher concentrations in sidestream smoke
2 than in mainstream smoke. Thus, the total
3 smoke exposure of nonsmokers is
4 quantitatively much smaller than the
5 exposure to smokers, but the smoke
6 nonsmokers inhale may be qualitatively
7 richer in certain compounds than mainstream
8 smoke."

9 Do you see that, sir?
10 A Yes I do.
11 Q That was known in 1979, wasn't it, Doctor?
12 A That's correct.
13 Q In fact, a table, Table 1 appears below that
14 language, doesn't it, sir?
15 A That's correct.
16 Q And that table is titled "Constituents of
17 Cigarette Smoking, Ratio of Sidestream Smoke
18 to Mainstream Smoke." You see that, sir?
19 A Yes, I do.
20 Q Would you explain to the jury what is meant
21 by ratio of sidestream smoke to mainstream
22 smoke.
23 A Well, sidestream smoke would be that smoke
24 which is emitted from the cigarette into the
25 atmosphere. Mainstream smoke is that which

3387

1 is inhaled.
2 Q Yes, sir. Could you explain what is meant
3 by a ratio for a compound between those two
4 smokes?
5 A Would be the relative difference between
6 those two.
7 Q Now, that table contains first a section A
8 titled, "Gas Phase," doesn't it?
9 A Yes, it does.
10 Q And in that section there's a compound
11 listed dimethyl nitrosamine. Do you see
12 that, sir, on the right-hand side of that
13 section A? Next to the last compound on the
14 right-hand side.
15 A Yes. Yes. I see it.
16 Q Dimethyl nitrosamine is a nitrosamine, isn't
17 it, Dr. Richmond?
18 A That's correct.

19 Q Under the sidestream/mainstream column, the
20 No. 52 appears, doesn't it, sir?
21 A Yes.
22 Q Would you explain to the jury what that 52
23 means in that column.
24 A Well, it's the amount in sidestream smoke
25 relative to mainstream smoke.

3388

1 Q Yes, sir. Does that mean that the compound
2 dimethyl nitrosamine is 52 times, in a
3 weight-by-weight comparison between
4 sidestream smoke and mainstream smoke, that
5 that compound is 52 times as concentrated in
6 sidestream smoke than it is in mainstream
7 smoke?
8 A That's correct.
9 Q And that was obviously known in 1979, wasn't
10 it, sir?
11 A That's correct.
12 Q Would you look down at the section B,
13 particulate phase. At the bottom of the
14 first column, the compound benzo(a)pyrene
15 appears. You see that, sir?
16 A That's correct.
17 Q What number appears in the sidestream smoke,
18 the mainstream smoke ratio there?
19 A 3.4.
20 Q And again, that would mean that
21 benzo(a)pyrene was 3.4 times as much on a
22 milligram-per-milligram basis, comprised 3.4
23 times as much of sidestream smoke as it does
24 mainstream smoke, doesn't it, sir?
25 A That's correct.

3389

1 Q And obviously that was also known in 1979.
2 A That's correct.
3 Q Sir, I'm going to ask you a question about
4 page 11-24.
5 A All right. I have it.
6 Q At the bottom of that page, there's a topic
7 titled, "Other Substances." You see that,
8 sir?
9 A Yes.
10 Q And that first paragraph involves a
11 discussion of the concentration of
12 benzo(a)pyrene in environments where
13 cigarette smoking is permitted, doesn't it?
14 A Yes.
15 Q And the last sentence of that paragraph
16 reads, "The effect of chronic exposure to
17 very low levels of this carcinogen has not
18 been established for humans," doesn't it?
19 A Yes, that says that.
20 Q And Dr. Richmond, since release of the 1979
21 report, there has been no inhalational study
22 showing the chronic exposure to very low
23 levels of benzo(a)pyrene induced lung tumors
24 in animals, has there, sir?
25 A Since '79?

3390

1 Q Yes, sir.
2 A I would have to look at the literature to
3 affirm that but --

4 Q As you sit here today, I take it no study
5 comes to mind?
6 A That's correct.
7 Q I want to ask you a question about the next
8 side of that page, Doctor, 11-25. First
9 paragraph.
10 A Yes.
11 Q That first paragraph is a discussion of the
12 nitrosamine that you and I just discussed,
13 that being dimethyl nitrosamine and the
14 concentration of that nitrosamine in rooms
15 where smoking is permitted, isn't it?
16 A Yes, that's right.
17 Q I want to ask you to look at the last
18 sentence of that paragraph with me, which
19 reads: "However, it is not clear that the
20 absorption of nitrosamine from environmental
21 conditions is equivalent to the absorption
22 by smoking, and it is also not established
23 that nitrosamines can act as carcinogens at
24 these levels delivered by inhalation."
25 You see that, sir?

3391

1 A Yes, I do.
2 Q All right, Doctor. Isn't it also true that
3 there have been no inhalational studies
4 published since 1979 that demonstrate that
5 nitrosamines, in the concentration present
6 in environmental tobacco smoke, induce an
7 increased number of lung tumors in animals?
8 A Well, again, I would have to review that
9 literature. I've not reviewed that
10 literature recently.
11 Q So just as for benzo(a)pyrene, I take it,
12 sir, that none come to mind as you sit here
13 today?
14 A That's correct.
15 Q One more question in the report, Doctor, on
16 page 11-28. Mr. Ohlemeyer asked you about
17 some of the conclusions in the report
18 regarding environmental tobacco smoke. I
19 don't believe he asked you about this one.
20 On 11-28, in the first full paragraph, it is
21 stated that, "Healthy nonsmokers exposed to
22 cigarette smoking have little or no
23 physiologic response to the smoke and what
24 response does occur may be due to
25 psychological factors."

3392

1 You see that, sir?
2 A Where are you reading? 11-28.
3 Q 11-28, I was reading from the first full
4 paragraph, begins, "In summary."
5 A Oh, yes. Okay.
6 Q Would you like for me to read it again,
7 Doctor?
8 A Yes, would you, please.
9 Q "Healthy nonsmokers exposed to cigarette
10 smoking have little or no physiologic
11 response to the smoke and what response does
12 occur may be due to psychological factors."
13 A That was correct as of that time.
14 Q Okay. Doctor, with respect to the '79

15 report, isn't the bottom line that at that
16 time, after the comprehensive review of
17 public literature that was undertaken, there
18 was simply no hard evidence that exposure to
19 environmental tobacco smoke was inducing
20 chronic disease in nonsmokers?

21 A That's correct. And again, I come back to
22 the fact that although there were some
23 studies that were suggestive at that time,
24 that I felt we needed more research.

25 Q You identified it as a topic that clearly
3393

1 needed further research?

2 A Yes.

3 Q Mr. Westbrook also asked you about some
4 conclusions that appeared in the 1986
5 report. Do you recall that, Doctor?

6 A Yes, I do.

7 Q Are you familiar with the statement in that
8 report that simple separation of smokers and
9 nonsmokers within the same airspace may
10 reduce, but does not eliminate, exposure of
11 nonsmokers to environmental tobacco smoke?

12 A That's correct.

13 Q I take it you agree with that concept,
14 principle, don't you, Doctor?

15 A I do.

16 Q Now, in essence, that's a very important
17 principle, isn't it, Doctor?

18 A Yes. Particularly that related, for
19 example, to the banning of smoking in
20 aircraft. That is the complete banning
21 rather than just having separate smoking
22 sections.

23 Q Doctor, it is true --

24 A Because of the diffusion of the smoke
25 throughout the cabin.

3394

1 Q But it is true that simply separating
2 smokers and nonsmokers within a given
3 environment reduces the environmental
4 tobacco smoke exposure of a nonsmoker,
5 doesn't it?

6 A Well, not -- not as effectively, in general,
7 as one would hope. One would need to know
8 something about the ventilation of the room.

9 Q Okay.

10 A But certainly in connection with aircraft
11 cabins, it was determined by 1988 that that
12 was an undesirable environment for
13 nonsmokers.

14 Q By 1988 the science was available to make
15 that type of determination?

16 A That's correct. That's correct.

17 Q You and Mr. Westbrook talked about the
18 development in the production of the 1979
19 Surgeon General's Report.

20 Do you recall that?

21 A That's correct.

22 Q Doctor, I take it that nobody associated
23 with the cigarette manufacturing companies
24 was asked to draft a chapter of that report?

25 A I wouldn't be absolutely certain of that

without going back and reviewing the credentials of all of the people who were asked.

Q Does anyone come to mind now?

A No.

Q Was anyone with the cigarette manufacturing industry asked to peer review a chapter of that report?

A Well, I would answer in the same way that I would have to go back and review the credentials. We're dealing with more than 100 people there, so from memory, I wouldn't know.

Q Well, it's probably pretty obvious to you isn't it, Doctor, that a copy of that report was never provided to the cigarette manufacturers to comment upon?

A That's correct. It was provided to peer reviewers. Whether any industry scientists were peer reviewers, I just don't know. Industry scientists, in general, were not publishing in the literature, so they would not ordinarily have been thought of as peer reviewers.

Q In addition to peer reviewers, the '79

report was also provided to the media before it was released to the public, wasn't it?

A No. No. Absolutely not.

Q Doctor, didn't you testify --

A 24 hours.

Q Okay.

A Before, but on the condition that it was embargoed until the press conference.

Q And that embargo --

A But the media never had access to any parts of the document prior to that time.

Q I take it that embargo was intended to extend to members of the tobacco industry.

A The embargo was intended -- only the press was permitted access to the document prior to the press release.

Q That's what you complained of today, isn't it, Doctor, that the tobacco industry was able to acquire either some part or all of this report before it was released to the public?

A That's why I referred to it as an irregular or inappropriate kind of acquisition.

Q Because you didn't want the industry to see the report before it was released.

A We didn't want anybody to see it before it was released. That's not because it was a secret document, because more than 100 reviewers had already looked at portions.

Q Dr. Richmond, was there anything inappropriate about the tobacco industry having an interest in what the report said?

A Nothing inappropriate about their having an interest. But again, I come back to ethics. The ethics of having the document they were

11 not entitled to at that time, I think, is
12 important to take note of.

13 Q We have established that you really don't
14 have any idea how they got that document?

15 A That's correct.

16 Q You were asked a couple of questions by
17 Mr. Westbrook about document 14333 in
18 evidence, a memorandum that appears to be
19 from Dr. Rodgman of RJ Reynolds. Do you
20 recall those?

21 A That one is the document I think that
22 referred to the evidence being overwhelming
23 concerning --

24 Q That's right. That's right.

25 A -- the relationship of tobacco smoking to
3398

1 health.

2 Q Yes, sir.

3 A Particularly to cancer.

4 Q Yes, sir. Have you ever met Dr. Rodgman and
5 talked to him about what he meant by that
6 language?

7 A No, I don't know.

8 Q Now, you recall that document was dated
9 1962?

10 A That's correct.

11 Q Obviously, the fact that you didn't have
12 access to that document didn't prevent you
13 in 1979 from concluding that active smoking
14 was a cause of lung cancer, did it?

15 A No, it didn't. Didn't prevent me from using
16 the same word that he used, and that is that
17 the data were overwhelming.

18 Q That's right. In fact, it didn't prevent
19 the Surgeon General in 1964 from concluding
20 that tobacco smoking was a cause of lung
21 cancer?

22 A That's true.

23 MR. FURR: That's all I have.

24 Thank you, Doctor.

25 MR. OHLEMEYER: Your Honor, when we
3399

1 took a break, I had half a question out. I
2 forgot to finish it.

3 THE COURT: Why don't you finish
4 it.

5 CROSS EXAMINATION (cont.)

6 BY MR. OHLEMEYER:

7 Q I just have two questions for you. One,
8 you've spent your career in public health;
9 is that right?

10 A The latter part.

11 Q The latter part. It's been a big part?

12 A Latter part of 60 years, 30 years.

13 Q It's been a big part of your career?

14 A That's correct.

15 Q Is it fair to say, Doctor, that there hasn't
16 been a public health issue that has received
17 more attention, more publicity, more
18 newspaper space, than cigarette smoking and
19 health over the past 35 years?

20 A Well, I think that might be a fair
21 statement. Many health issues have received

22 a lot of attention.
23 Q But it's fair to say, Doctor, that of all
24 those health issues, none has received as
25 much attention as cigarette smoking and
3400
1 health?
2 A Consistent attention, that's probably true.
3 MR. OHLEMEYER: Thank you. That's
4 all I have.
5 THE COURT: Redirect, Counselor?
6 MR. WESTBROOK: Counselor, could I
7 see your chart?
8 MR. OHLEMEYER: Sure.
9 MR. WESTBROOK: Thank you so much.
10 REDIRECT EXAMINATION
11 BY MR. WESTBROOK:
12 Q Doctor, I'm going to try to turn it this way
13 so you can see the chart, perhaps also this
14 way so the jury can see it.
15 Counsel was going through with you some
16 of the Surgeon General's reports and what
17 was going on with them. I guess he did it
18 this side. Do you recall that discussion
19 going through the Surgeon General's reports?
20 A Yes.
21 Q And what the Surgeon General was saying.
22 Over here I wanted to ask you, Doctor,
23 did the tobacco industry, as the Surgeon
24 General was coming through and trying to
25 make its points and reaching its
3401
1 conclusions, did the tobacco industry
2 provide any of its internal information in
3 '72, '75, '79, '82, or '86, to your
4 knowledge, to the Surgeon General?
5 A Not to the best of my knowledge.
6 Q Its contribution from its internal reports
7 was zero; correct?
8 A That's correct. Yes, we knew that they had
9 industry scientists who were conducting
10 research but, particularly, as I became,
11 because of my interest in children and
12 adolescents, interested in how adolescents
13 took up the habit of smoking, I was
14 particularly interested in some of their
15 marketing research, that was never shared.
16 We knew they had a lot of marketing
17 research.
18 Q Doctor, there was discussion about your
19 letter to the industry on additives, and
20 counsel asked you about the confidentiality
21 concerns that the industry had. In your
22 letter, and that's 13678, did you, in fact,
23 tell the industry that you had been assured
24 that you had the authority to protect the
25 confidentiality of their ingredients if they
3402
1 gave them to you?
2 A Yes, and that was also the reason why I had
3 our general counsel's office represented in
4 the meeting with Covington & Burling
5 representing the Tobacco Institute.
6 Q And after you gave the industry that

7 assurance, that you would protect the
8 confidentiality of their additives, did they
9 bring the binders over so you could see
10 them?

11 A No, they did not.

12 MR. WESTBROOK: Your Honor, we have
13 found another copy of the letter that
14 Dr. Richmond wrote to another tobacco
15 company. I've marked it as 13678A. It's
16 identical to 13678 except for the addressee.
17 We'd like to introduce that letter, same
18 letter, Your Honor, just illustrates
19 Dr. Richmond's testimony that the identical
20 letter was sent to other companies.

21 THE COURT: Any objection?

22 MR. OHLEMEYER: Same objections
23 Your Honor, as stated previously.

24 THE COURT: All right. The
25 objections noted and overruled, 13678A will
3403

1 be admitted.

2 (Plaintiffs' Exhibit(s) 13678A received
3 in evidence.)

4 Q Dr. Richmond, do you recognize your
5 signature on the second page of 13678A?

6 A Yes, I do.

7 Q And is that a version of your letter on
8 additives, this time addressed to the
9 executive vice president of RJ Reynolds
10 Tobacco Company?

11 A Yes.

12 Q After Reynolds got its copy of the letter,
13 did it come forward with its additives list
14 for you and provide you with the additives
15 for each of its cigarettes?

16 A No, they did not.

17 Q Dr. Richmond, counsel referred to whether
18 you were familiar with the ingredients in
19 Coca-Cola. Dr. Richmond, to your knowledge,
20 does Coca-Cola kill over 300,000 people a
21 year?

22 MR. OHLEMEYER: Objection, Your
23 Honor, argumentative.

24 THE COURT: Sustained.

25 Q Dr. Richmond, are you aware of any

3404

1 epidemiological, pathological,
2 microbiological or other studies showing
3 that Coca-Cola causes cancer in anybody?

4 A No, I'm not. And I think if I had been, I
5 would have asked for some action.

6 Q There were questions to you about Secretary
7 Califano's statement in the 1979 Surgeon
8 General's Report to the effect that smoking
9 was slow-motion suicide. You remember those
10 questions?

11 A That's correct.

12 Q Did the tobacco industry come in and agree
13 with Secretary Califano?

14 A Not to the best of my knowledge.

15 Q The best of your knowledge, up to today,
16 1998, has the tobacco company, any tobacco
17 company come in and agreed publicly that

18 smoking is slow-motion suicide?
19 A No, I don't think they have.
20 Q There were questions about what
21 Mr. Califano's role was as a lawyer and what
22 he knew and what you knew concerning the '79
23 Surgeon General's Report and that process.
24 Do you remember that?
25 A Yes, that's correct.

3405

1 MR. WESTBROOK: Your Honor, we
2 would like to show Dr. Richmond the letter
3 from Secretary Califano concerning the same
4 process. It's been marked as Exhibit 9037
5 and published in the Journal of the American
6 Medical Association, October 19, 1994.

7 (Bench discussion)
8 Q Dr. Richmond, there was questioning by
9 counsel about a link, potential link of
10 pancreatic cancer and diet; do you remember
11 those questions?

12 A Yes, sir.

13 MR. WESTBROOK: All right. May I
14 approach the witness, Your Honor? I have
15 two pages out of the '79 report.

16 THE COURT: Yes.
17 Q Dr. Richmond, I would like for you to read
18 to the jury, if you would, from page 5-53,
19 the conclusions from your Surgeon General's
20 report on pancreatic cancer and smoking, the
21 conclusion No. 1.

22 MR. OHLEMEYER: What page?
23 Q Would you read that conclusion, what you
24 concluded about the link between pancreatic
25 cancer and smoking, Dr. Richmond?

3406

1 A "Epidemiological data from prospective and
2 retrospective investigations have
3 demonstrated a significant association
4 between cigarette smoking and cancer of the
5 pancreas."

6 Q Thank you, sir. Dr. Richmond, there were
7 questions about Dr. Ernst Wynder during
8 cross-examination. You remember those
9 questions?

10 A Yes, I do.

11 Q All right. And counsel gave you
12 Dr. Wynder's article on epidemiological
13 methods and their usefulness in detecting
14 increased risk for ETS. Do you recall that?

15 A That's correct.

16 Q All right.

17 MR. WESTBROOK: Your Honor, may I
18 approach the witness to save a minute?

19 THE COURT: Sure.
20 Q Doctor, I've marked from page 145 of the
21 article what Dr. Wynder said about the power
22 of his particular study. Could you read to
23 the jury what Dr. Wynder said about the
24 power of his epidemiological study to detect
25 a risk?

3407

1 A Yes. What he said is the following: "The
2 present study had limited statistical power

3 to detect an effect of exposure to
4 environmental tobacco smoke."
5 Q Was Dr. Wynder saying that ETS does not
6 cause cancer based on epidemiology in any
7 way?
8 A No, he was --
9 MR. OHLEMEYER: Objection, Your
10 Honor, leading.
11 THE COURT: Sustained. You don't
12 have to answer that, Doctor.
13 Q Doctor, from your review of the article, was
14 Dr. Wynder taking a position on whether ETS
15 caused cancer or not?
16 MR. OHLEMEYER: Same objection,
17 Your Honor.
18 THE COURT: Sustained. Same
19 question.
20 Q Doctor, are you familiar with the
21 International Agency for Research on Cancer?
22 A Yes, I am.
23 Q Is that a respected group which studies
24 cancer issues?
25 A Yes, it is.

3408

1 Q All right. And sometimes is that group
2 called IRAC?
3 A That's correct.
4 Q And does the IRAC issue monographs at times?
5 A Yes, it does.
6 Q Doctor, are you familiar with an IRAC
7 monograph on tobacco smoking published by an
8 IRAC working group of which Dr. Wynder was a
9 member in 1985, are you generally familiar
10 with that group?
11 A In general, yes. I've looked -- I've not
12 looked at that recently.
13 THE COURT: I didn't hear the last,
14 Doctor.
15 A I have not looked at that recently, I said.
16 MR. WESTBROOK: Okay. Your Honor,
17 with permission, I'd like to approach and
18 show the doctor an excerpt from the
19 monograph by the working group on which Dr.
20 Wynder, the same Dr. Wynder that
21 participated.
22 Q First of all, Doctor, on page 10, listing
23 the individuals, do you see E. L. Wynder,
24 President of the American Health Foundation?
25 A That's correct.

3409

1 Q All right. Is that the same individual?
2 A Same. That's the same person.
3 Q Turning to page 314, monograph volume 38,
4 could you read the statement, "The
5 observation on nonsmokers."
6 THE COURT: Is this in evidence,
7 Counselor?
8 MR. WESTBROOK: No, Your Honor,
9 it's not.
10 THE COURT: He won't read it then.
11 MR. OHLEMEYER: It's beyond the
12 scope of the cross.
13 MR. WESTBROOK: We would offer

14 this -- this is the same group Wynder, this
15 is a group on which he participated on the
16 very issue about whether all the evidence
17 taken together shows whether ETS causes
18 cancer, not just the epidemiological rate
19 that we're looking at.

20 MR. OHLEMEYER: It's beyond the
21 scope of the cross, Your Honor. It's dated
22 ten years before the excerpt that was
23 brought to the witness' attention.

24 THE COURT: It's outside the scope,
25 Counselor.

3410

1 Q Doctor, there were discussions about the
2 tobacco industry and regulation of the
3 tobacco industry. Are you familiar with the
4 group called, the Safety Consumer that
5 regulates products in this country?

6 A Yes, I am.

7 Q Is the tobacco industry exempt from that
8 regulation?

9 A Not to the best of my knowledge.

10 Q Are you familiar with the Food and Drug
11 Administration?

12 A Yes.

13 Q All right. When you were the Surgeon
14 General, did the Food and Drug
15 Administration have authority to regulate
16 the ingredients in tobacco?

17 A Not really. I might add, we often raised
18 questions about whether we did, but it was
19 not established.

20 Q Dr. Richmond, from your observations as a
21 leader in the field of public health, and
22 over the years during the time that counsel
23 was discussing with you these changes in
24 cigarettes, such as expanded tobacco and
25 filtration, is it a fact that the death toll

3411

1 from cigarette smoking continued to rise?

2 MR. OHLEMEYER: Objection, Your
3 Honor. It's argumentative.

4 MR. WAGNER: And there's no
5 foundation.

6 MR. WESTBROOK: It's right off his
7 question about the changes in cigarettes.

8 THE COURT: You may answer that,
9 Doctor.

10 A Yes, the mortality rates did continue to
11 rise.

12 Q Dr. Richmond, as a public health official,
13 do you agree that the way to cut down the
14 risk from environmental tobacco smoke from
15 cigarettes is to reduce the toxins in the
16 sidestream smoke?

17 A Oh, that would be one approach.

18 Q Another approach would be prohibition of
19 smoking, but you're not in favor of that,
20 are you?

21 A No, I'm not in favor of prohibition.

22 THE COURT: I didn't hear the last.

23 THE WITNESS: I'm not in favor of
24 prohibition, but I would come back to your

25 point that smoking is the single most
3412
1 preventable cause of death in this country.
2 So smoking cessation would be the single
3 most important thing we could do to reduce
4 mortality from cancer and heart disease
5 associated with smoking.
6 Q And there were questions to you, Doctor,
7 about media efforts and the fact that the
8 Tobacco Institute might hold a press
9 conference and you would hold a press
10 conference, reporters would run back and
11 forth. Do you recall that?
12 A Yes.
13 MR. WESTBROOK: Your Honor, I would
14 like to show the doctor Exhibit 7086 and
15 move for its admission into evidence. This
16 document is not in evidence yet, Your Honor.
17 This is a contemporaneous document, document
18 contemporaneous with the events we talked
19 about. It was approximately one week after
20 the events, it is the recap by the president
21 of the Tobacco Institute. We're offering it
22 against the Tobacco Institute only
23 concerning the events that took place during
24 that rather busy week in January of 1979.

25 THE COURT: Any objection?

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1 MR. OHLEMEYER: Lack of foundation,
2 Your Honor, and inadmissible under Rule 403.

3 THE COURT: 7086 will be admitted,
4 ladies and gentlemen, only against the
5 Tobacco Institute.

6 (Plaintiffs' Exhibit(s) 7086 received
7 in evidence.)

8 Q Doctor, let me hand you a copy of this
9 document, Exhibit 7086, entitled, "Remarks
10 of Horace Kornegay, 28 Tobacco Workers
11 Conference, Orlando, Florida, January 15,
12 1979," entitled, "Aftermath of the Surgeon
13 General's Report 1979."

14 Do you see that, Doctor?

15 A Yes, I do.

16 Q All right. And that Surgeon General's
17 Report again is the one that we've been
18 referring to for most of the afternoon;
19 correct?

20 A That's correct.

21 Q Let me read the first paragraph: "Through
22 the long days and nights of the last week,
23 the bombs were bursting in the air and in
24 the newspapers as we suffered through
25 another battle in the long war against

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1 tobacco. In the dawn's early light, we saw
2 that the tobacco industry was still there,
3 our flag still flying over our ramparts.
4 Secretary Califano fired his salvo, a
5 massive 1200-page Surgeon General's report."

6 Was that your report?

7 A That's my report.

8 Q "We replied in advance with our own."

9 Is that what you testified about today,

10 that they had replied before you put yours
11 out?

12 A That's right.

13 Q All right. "After the smoke cleared, one
14 thing was obvious: tobacco causes
15 controversy and confusion."

16 Dr. Richmond, is that consistent with
17 the position that you observed from the
18 tobacco interests during the years that you
19 were Surgeon General, that the industry
20 consistently claimed that there was
21 controversy and confusion over whether
22 smoking causes disease?

23 MR. WAGNER: Judge, before the
24 witness answers, may I have the same
25 continuing objection stated before as to

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1 questioning about this document; leading,
2 suggestive, asking the witness to comment
3 about a hearsay document, all those other
4 objections I made before?

5 THE COURT: All right. The
6 objection is overruled. I will show a
7 continuing objection, Mr Wagner.

8 MR. WAGNER: Thank you, Your Honor.

9 THE COURT: Yes, sir.

10 A Well, it was very apparent that this was
11 consistent with the industry's effort to sow
12 confusion and to create controversy after
13 there was no scientific controversy about
14 the effects. And indeed, they've continued
15 that until very recently.

16 Q Are you familiar with the tobacco industry
17 making attacks on Secretary Califano for his
18 role in the 1979 Surgeon General's Report?

19 A Yes, very much.

20 MR. WAGNER: Objection, Your Honor,
21 argumentative.

22 THE COURT: Overruled.

23 Q Doctor, turn to page 2 of the document, the
24 paragraph labeled Third, which is in the
25 middle which says, "Third, we are protesting

3416

1 Mr. Califano's 'crazed' reformism."

2 Do you see that, sir?

3 A Yes, I do.

4 Q Is that consistent with the attitude you
5 experienced expressed by the tobacco
6 industry towards Secretary Califano's
7 efforts on public health and smoking during
8 the period when you were Surgeon General?

9 A That's correct.

10 MR. WESTBROOK: Your Honor, we
11 would like to introduce into evidence next
12 Plaintiffs' Exhibit 12995, which is a speech
13 by the Assistant to the President of the
14 Tobacco Institute in 1978. We offer this
15 against the Tobacco Institute, Your Honor.

16 MR. OHLEMEYER: Your Honor, my
17 objection is to the relevance, and under
18 Rule 403, it's a speech that, if it was
19 given, it appears to be given to the Kiwanis
20 of Pennsylvania Hill, Pennsylvania, and the

21 Beaver, Pennsylvania Rotary Group. I think
22 it's beyond the scope of cross-examination.

23 THE COURT: I agree. Sustained.
24 It won't be admitted.

25 Q Dr. Richmond, I'd like to show you a
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1 document that is in evidence, Plaintiffs'
2 Exhibit 21747. Dr. Richmond, I want to ask
3 you about some of the statements in this
4 document which is entitled, "Notes on a
5 Special Meeting of the UK Industry on
6 Environmental Tobacco Smoke, London,
7 February 17, 1988."

8 Under Summary, on the first page.

9 A Yes.

10 MR. SHOCKLEY: Would you clarify as
11 to my records?

12 MR. WESTBROOK: Yes, sir. Your
13 Honor, Counsel has reminded me this document
14 was indicated to be admissible against Brown
15 & Williamson only at this time.

16 THE COURT: Brown & Williamson
17 only, ladies and gentlemen.

18 Q Dr. Richmond, under Summary, "Philip Morris
19 presented to the UK industry their global
20 strategy on environmental tobacco smoke.
21 And every major international area (U.S.A.,
22 Europe, Australia, Far East, South America,
23 Central America, and Spain.) They are
24 proposing in key countries to set up a team
25 of scientists organized by one national

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1 coordinating scientist and American lawyers
2 to review scientific literature or carry out
3 work on ETS to keep the controversy alive."

4 Dr. Richmond, is this effort to keep
5 the controversy alive the same effort that
6 you experienced personally as Surgeon
7 General of the United States?

8 MR. WAGNER: Your Honor.

9 A Yes, it is.

10 MR. WAGNER: This was all gone into
11 on direct. It's outside the scope of proper
12 redirect. I'd also like the record to show
13 a continuing objection on the same grounds
14 to all of these documents, just so I don't
15 have to keep raising that. But I'd like to
16 emphasize the first objection, Your Honor,
17 that this is beyond the scope.

18 MR. WESTBROOK: Excuse me, Your
19 Honor. I don't think it is. Mr. Ohlemeyer
20 went through, from 1972 through the Surgeon
21 General's reports and what the Surgeon
22 General was doing. This document shows that
23 beginning with Dr. Richmond, or before, and
24 through, after these reports, the industry
25 was still trying to keep the ETS controversy

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1 alive.

2 THE COURT: The last objection is
3 overruled. I will show a continuing
4 objection, but Counselor, let's limit it to
5 the scope of cross.

6 MR. WESTBROOK: Thank you, Your
7 Honor.
8 Q Dr. Richmond, my question was: Sir, did you
9 also experience, while you were the Surgeon
10 General of the United States, a continuing
11 effort by the industry to keep the
12 controversy alive on smoking and health
13 issues?
14 A Yes.
15 Q Dr. Richmond, while you were Surgeon
16 General, did the industry come forward with
17 any of its internal documents to show you
18 whether it had cigarettes that would produce
19 less sidestream components and less toxins
20 in its laboratories?
21 MR. WAGNER: Beyond the scope
22 again, Your Honor.
23 THE COURT: Sustained.
24 MR. WESTBROOK: Dr. Richmond,
25 that's all I have. Thank you, sir.

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1 THE COURT: Thank you, Counselor.
2 Mr. Ohlemeyer, any recross?
3 MR. OHLEMEYER: Just a few, Your
4 Honor.
5 RE-CROSS-EXAMINATION
6 BY MR. OHLEMEYER:
7 Q Dr. Richmond, do you still have Plaintiffs'
8 7086 in front of you?
9 MR. OHLEMEYER: Excuse me, Mr.
10 Westbrook, do you have 7086?
11 THE COURT: We have it right here.
12 Q Doctor, let me hand you what's been marked
13 and admitted into evidence by the plaintiffs
14 as Exhibit 7086. It says up there in the
15 top right-hand corner these are the remarks
16 of Horace Kornegay. Do you see that?
17 A That's correct.
18 Q Do you know who Horace Kornegay was or is?
19 A He was the President of the Tobacco
20 Institute at that time.
21 Q And these appear to be remarks he gave to a
22 tobacco workers conference?
23 A 28th Tobacco Workers Conference.
24 Q It sounds like -- Orlando, looks like a
25 convention of tobacco people; right?

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1 A I assume that might be.
2 Q Do you see there on page 2, the first
3 paragraph?
4 A I see it.
5 Q Read that first paragraph for us.
6 A Starting, "Let me set the record straight
7 again here now"?
8 Q Correct.
9 A "First, the Tobacco Institute does not
10 reject the linkage of the health problems
11 with cigarettes. We simply point out again
12 and again that linkage means statistical
13 association. It does not mean proof of
14 cause and effect. The original Surgeon
15 General's report admitted as much 15 years
16 ago. That's a statistical association,

17 cannot establish cause and effect, is a
18 fundamental principle of science."
19 Q And that's a correct statement, isn't it,
20 that the Surgeon General --
21 A Oh, no, no.
22 Q Excuse me, sir. The Surgeon General in 1964
23 acknowledged that you can't use statistics
24 to prove the cause of disease in an
25 individual; right?

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1 A In an individual, but you certainly -- it
2 proves causation of disease.
3 Q It suggests --
4 A That's a time-honored principle.
5 Q Am I correct that even into the '70s, Dr.
6 Richmond, the Surgeon General has stated
7 that statistics in and of themselves don't
8 prove cause and effect relationships?
9 A No. The Surgeon General never said that.
10 Q Am I correct, Doctor, that in 1964, the
11 Surgeon General stated in his first report,
12 or in the report to the Surgeon General,
13 that statistical methods cannot establish
14 proof of a causal relationship in an
15 association because the causal significance
16 of an association is a matter of judgment
17 which goes beyond any statement of
18 statistical probability?
19 A Well, that -- that's appropriate wording.
20 Q And do you recall that in 1975, the Surgeon
21 General's Report noted that demonstrating an
22 association by statistical probability is
23 not enough to establish the causal nature of
24 that kind of relationship?
25 A Well, there is a causal relationship that is

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1 shown in the statistical association.
2 Q Let me show you, Doctor, a copy of the 1975
3 Surgeon General's report.
4 MR. MOTLEY: Your Honor, is this
5 one in evidence?
6 THE COURT: No.
7 Q And let me ask you to read, Doctor, the
8 first sentence here of this paragraph at the
9 bottom of page 3.
10 A "However, demonstrating an association by
11 statistical probability is not enough to
12 establish the causal nature of a
13 relationship." It goes on to say
14 "Determining that the association between
15 smoking and excess death rates is cause and
16 effect was a judgment, was a judgment made
17 after a number of criteria had been met, no
18 one of which by itself is sufficient to make
19 the judgment."
20 But the judgment has been made that
21 there is a causal relationship.
22 Q I understand that, Doctor, but my question
23 is, that isn't it a fact that you can't make
24 that judgment based on statistical
25 associations?

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1 A Well, I think if you look at the report of

2 P. N. Lee, who was an industry consultant in
3 Great Britain, he points out that that is
4 the way to make that relationship known,
5 that is the relationship between smoking and
6 health.

7 Q Let me read a statement to you from the 1975
8 Surgeon General's Report. Page 167,
9 Counsel. And ask you if you agree with it.

10 "Epidemiologically-derived estimates of
11 relative risk generally indicate the excess
12 risk incurred by virtue of exposure to a
13 particular agent as compared with
14 non-exposure. But such a measure of
15 relative risk cannot be interpreted directly
16 as a quantitative indicator of the
17 chance that a particular individual's
18 exposure to the agent was responsible for
19 the occurrence of the disease concerned."

20 Do you agree with that statement?

21 A It's not a very clearly written statement.

22 Q A simpler way to explain that concept is
23 that you can't use the results of a
24 statistical study to prove the cause of
25 disease in an individual person.

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1 A Well, that isn't quite what it says but --
2 but I think in terms of the individual
3 statistical inferences can be used to infer
4 causation.

5 Q Would you agree with me, Doctor, that
6 statements concerning causality in an
7 individual case are particularly difficult
8 when the disease of interest has multiple
9 causes and interactions among them are of
10 potential importance?

11 A But that's the whole role of epidemiology
12 and biostatistics, is to deal with those
13 multiple factors and to isolate them one by
14 one.

15 Q So back to Plaintiffs' Exhibit 7086,
16 Mr. Kornegay's statement that a statistical
17 association cannot establish cause and
18 effect is a fundamental principle of
19 science.

20 A That's wrong. That's plain, outright wrong.

21 Q The Surgeon General's wrong when he said it?

22 A No.

23 MR. MOTLEY: Excuse me, Your Honor.
24 He's arguing. He said the Surgeon General
25 didn't say that.

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1 THE COURT: I think the last was
2 argumentative. Sustained.

3 Q You see farther down in Exhibit 2, Doctor.

4 A Yes.

5 Q Dr. Kornegay says he met with the media on
6 January 10th to present the Tobacco
7 Institute's position, right?

8 A Where?

9 Q I'm sorry. Is --

10 A Oh, on that same page?

11 Q Yes.

12 A Yes. Okay.

13 Q He points out he wasn't too optimistic that
14 his message would get through; right?
15 A That's correct.
16 Q He goes on to say his pessimism was
17 justified by the news coverage; right?
18 A That's what he says.
19 Q Now, on the next page, page 3, at the bottom
20 of the page.
21 A Yes.
22 Q Mr. Kornegay says that it should also be
23 noted that Secretary Califano announced
24 before an AFL-CIO audience -- do you know
25 what the AFL-CIO is?

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1 A Yes, I do.
2 Q What is it?
3 A American Federation of Labor, the Congress
4 of Industrial Organizations.
5 Q That Secretary Califano announced before an
6 AFL-CIO audience in September of 1978 that
7 up to 40 percent of all cancers in the U.S.
8 may be caused by chemicals in the workplace.
9 Do you recall Secretary Califano making
10 that statement?
11 A He may have. I don't recall it
12 specifically.
13 Q All right. Now, when you were the Surgeon
14 General, Dr. Richmond, why didn't you tell
15 the Food and Drug Administration to regulate
16 the cigarette industry?
17 MR. WESTBROOK: Objection, Your
18 Honor, there's no foundation that
19 Dr. Richmond had any authority to do that.
20 Q Well --
21 THE COURT: Rephrase that, Counsel.
22 Q Let me rephrase the question. When you were
23 the Surgeon General, did you have any
24 authority to order the Food and Drug
25 Administration to regulate the tobacco

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1 industry?
2 A We considered, as I indicated earlier,
3 whether or not we had that authority and we
4 concluded that we probably didn't at that
5 time.
6 Q That the law didn't give them the authority
7 to do that.
8 A It was being debated. We never concluded it
9 firmly, but we didn't press it.
10 Q Now, you mentioned that when you were the
11 Surgeon General, you and other members of
12 your office were aware of the fact that
13 cigarette companies had employed scientists
14 to work at those companies?
15 A That's correct.
16 Q They included chemists and toxicologists?
17 A That's correct.
18 Q And, in fact, not only did you know that
19 they were employed at those companies, you
20 knew who some of them were, didn't you?
21 A Well, some of them.
22 Q Because they were part of that Tobacco
23 Working Group; weren't they?

24 A That's correct.
25 Q And, in fact, in the Tobacco Working 3429
1 Group -- by the way, the Tobacco Working
2 Group was formed in about 1968?
3 A I think that would be approximately right.
4 Q And this was disbanded in about 1977; right?
5 A That's correct.
6 Q And in the reports of that working group,
7 there's a list of the company people and the
8 other people who were involved in that
9 effort; right?
10 A That's correct.
11 Q And, for example, several of the people who
12 have been identified as cigarette company
13 scientists are on that list, aren't they?
14 A That's correct.
15 Q Including Alan Rodgman; right?
16 A That's correct.
17 Q Do you know if that's the same Alan Rodgman?
18 A Very likely. Very likely.
19 Q Helmut Wakeham?
20 A Yes. He was from Philip Morris, yes.
21 Q And Jesse Steinfeld is listed here, too,
22 isn't he?
23 A Not as an industry person.
24 Q Correct. Just as a participant?
25 A That's correct. He was at the National

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1 Cancer Institute at that time.
2 Q And the reports that this group put together
3 were published by the government and made
4 available to the press, the public and
5 others?
6 A That's correct.
7 MR. OHLEMEYER: That's all I have,
8 Your Honor. Thank you.
9 THE COURT: Mr. Furr, anything?
10 MR. FURR: Yes.

11 RE-CROSS-EXAMINATION

12 BY MR. FURR:

13 Q Hi, Dr. Richmond. Mr. Westbrook asked you
14 about a statement in the 1979 Surgeon
15 General's report with respect to an
16 association between active smoking and
17 pancreatic cancer; do you recall that, sir?
18 A Yes, sir, that's correct.
19 Q Would you tell the jury what epidemiology
20 data were available in 1979 linking
21 environmental tobacco smoke exposure to
22 pancreatic cancer?
23 A In the '79, I'm only making this as an
24 assumption, because we had very little data
25 on environmental tobacco smoke, that there

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1 probably weren't such data.
2 Q Okay. Well, let's talk about today, Doctor.
3 Would you identify any studies that you're
4 familiar with that link exposure to
5 environmental tobacco smoke with an
6 increased risk of pancreatic cancer today?
7 A Oh, I would have to look at the literature.
8 I can't off the top of my head tell you

9 that.
10 Q Okay.
11 MR. FURR: Thank you. That's all I
12 have.
13 MR. MOTLEY: May the doctor be
14 excused?
15 THE COURT: Doctor, I very much
16 appreciate you coming to Indiana today.
17 Thank you very much.
18 THE WITNESS: Thank you, sir.
19 THE COURT: You may step down.
20 MR. MOTLEY: Judge, we've got three
21 or four evidentiary things leaning over our
22 heads.
23 THE COURT: Ladies and gentlemen, I
24 think we will excuse you tonight. We have
25 some matters we need to attend to. Rather
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1 than have you wait here, why don't we just
2 call it a day.
3 (Standard admonition)
4 MR. CASSELL: All rise.
5 THE COURT: Be seated. We're still
6 on the record.
7 (Jury not present)
8 THE COURT: Counselor, who will be
9 the next witness to be called tomorrow?
10 MR. MOTLEY: Your Honor, that's one
11 of the things I wanted to discuss with you.
12 We have a deposition we wanted to show in
13 the morning. It's actually trial transcript
14 of Mr. Joseph Baumgartner, former employee
15 of RJ Reynolds.
16 THE COURT: Also --
17 MR. MOTLEY: And then tomorrow we
18 have, I know we have Dr. Songer and
19 Dr. Turner and I think Dr. Murray, who is
20 not a local doctor, and there may be one
21 other local doctor, but I'm not sure, we've
22 disclosed those names. We're going to have
23 a full day tomorrow.
24 THE COURT: We had a full day
25 today.
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1 MR. MOTLEY: Oh, we got in a lot
2 today, Judge, we sure did. We got four
3 witnesses in today.
4 THE COURT: We'll talk about the
5 deposition that you want to offer first.
6 How long do you think that will take?
7 MR. MOTLEY: Your Honor, it's a
8 video of a trial transcript of
9 Mr. Baumgartner.
10 THE COURT: All right.
11 MR. MOTLEY: They allowed Court TV
12 to video the proceedings in the state court
13 of Florida. There's a statute that allows
14 them to do that kind of thing. And so since
15 video is better than just reading it, we
16 hope to edit the video of the -- to
17 eliminate -- there was no picture of the
18 jury, to eliminate anything other than the
19 witness and the interrogator.

20 THE COURT: Do you know how long
21 his testimony is?
22 MR. MOTLEY: Yes, Your Honor. It's
23 about 50 minutes, depending on whether you
24 sustain any of their objections. And that's
25 an estimate on my part, but since I did it,

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1 since I was there, it seemed an eternity,
2 but I think it was only 45 or 50 minutes. I
3 remember it was late on a Friday afternoon.

4 THE COURT: First matter I want to
5 resolve, there's a memorandum as to why the
6 transcript of the June 30th, '75
7 tape-recorded interview of John Hill is
8 admissible.

9 MR. MOTLEY: Yes, Your Honor, do
10 you -- we have had, Your Honor, a
11 stipulation of sorts with Mr. Ohlemeyer
12 about authenticity. I don't know when we
13 filed those papers if we had that; you may
14 recall we tried to get into this and there
15 was an objection of authenticity.

16 THE COURT: I'm talking about a
17 tape-recorded interview.

18 MR. MOTLEY: Yes. Yes, sir, that's
19 part of the collection. We have the
20 transcript by a court reporter of that oral
21 history. All of this was at a collection of
22 documents of Mr. John Hill, founding partner
23 of Hill & Knolton, who is unindicted, if I
24 can use that term in a civil case,
25 co-conspirator, in this case. And the

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1 stipulation of authenticity is that these
2 documents were found at this library.

3 THE COURT: No, Counselor, we're
4 talking about different things here.

5 MR. MOTLEY: I know, Judge. That
6 was there, too.

7 THE COURT: Oh, the --

8 MR. MOTLEY: Yes.

9 THE COURT: Okay, I'm sorry, go
10 ahead.

11 MR. MOTLEY: Yes, sir. And what
12 was not there is the fact that we had a
13 court reporter like this young lady take the
14 audio and transcribe it in the event Your
15 Honor didn't want to allow us to use the
16 audio tape. But the audio tape was there
17 along with the other documents that we
18 sought to admit, you may recall we tried to
19 do this ten days or so ago and there was an
20 authenticity objection.

21 We sent a witness to the collection,
22 one of our expert witnesses, and Mr. Patrick
23 and Mr. Ohlemeyer were able to accomplish
24 the saving of a lot of time for the Court by
25 entering a stipulation that essentially not

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1 that they were relevant or that they were
2 material or anything else but that they were
3 authentic.

4 So we're past that hurdle. And I don't

5 know whether the papers reflect that, Your
6 Honor, that's the reason I bring that up.

7 THE COURT: Mr. Riley filed a
8 memorandum with the Court regarding the
9 admissibility of that.

10 MR. MOTLEY: Yes, Your Honor.

11 THE COURT: Defense have an
12 objection to that?

13 MR. OHLEMEYER: To its
14 admissibility, certainly, Your Honor.
15 Mr. Patrick persuaded me that that tape was
16 found in a library in Wisconsin. And that
17 it was found in the, supposedly, the John
18 Wayne Hill file, so that part of the
19 problem, I think, we don't need to fight
20 about.

21 But I think that an audio tape of an
22 individual is pure, if not rank hearsay, and
23 it was -- it's not an ancient document,
24 doesn't come in under any other exception to
25 the hearsay rule. I think it's inadmissible

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1 for that reason, let alone the evidentiary
2 foundation, lack thereof, that this is
3 anything more than Mr. Hill's recollections
4 or opinions about something. I mean, it's
5 pure hearsay.

6 MR. MOTLEY: Sir, can I respond?

7 THE COURT: Certainly.

8 MR. MOTLEY: Judge --

9 MR. OHLEMEYER: I ought to add,
10 Your Honor, a tape-recorded interview, if
11 you accept Mr. Motley's characterization as
12 an unindicted co-conspirator, a tape review
13 20 years after the fact isn't a statement
14 made in furtherance of any conspiracy.

15 THE COURT: That's the question I
16 was going to ask, how is this made in
17 furtherance of the conspiracy?

18 MR. OHLEMEYER: It's his memoirs,
19 Your Honor.

20 MR. MOTLEY: I'm sorry, your
21 question just past.

22 THE COURT: Yes, I was going to ask
23 you, Counselor, is how is this statement
24 made in furtherance of the conspiracy, which
25 is one of the elements to make it admissible

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1 under the hearsay rule.

2 MR. MOTLEY: Well, Your Honor, you
3 got me there.

4 THE COURT: I thought I did.
5 That's why I asked.

6 MR. MOTLEY: That was a hard,
7 inside fastball and I swung and I missed.
8 Actually, I kept the bat on my shoulder.

9 Could we move on to the next document?

10 THE COURT: All right.

11 MR. MOTLEY: Your Honor, actually,
12 there is some law.

13 THE COURT: Well, there were some
14 cases in here Mr. Riley did.

15 MR. MOTLEY: Yes, sir. Your

16 question is a singular one, however, and
17 that is 20 years after the fact how is it
18 furtherance. One might -- you can make an
19 argument but it's late in the day, I don't
20 want to take up the Court's time with it.
21 Normally Hill & Knolton is a defendant and
22 there's not a problem, but they're not a
23 defendant.

24 THE COURT: I understand that. The
25 plaintiffs' exhibit which is a tape-recorded

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1 interview, Court finds not to be admissible.

2 MR. MOTLEY: Judge, while we're on
3 the subject, though, if we might, of the
4 John Hill collection.

5 THE COURT: I have it right in
6 front of me, your argument in support,
7 defendants' response. If I understand
8 correctly, now, Counsel, I do not have these
9 documents. Or have not reviewed them.

10 MR. MOTLEY: I tried to get them
11 into evidence when the trial first started,
12 we spoke about them in the abstract, but you
13 do not, you're correct, because we weren't
14 able to establish the authenticity at the
15 time, we reserved -- I have the document
16 right here, Your Honor, if I can hand you up
17 a copy.

18 THE COURT: Are there particular
19 documents from this collection that you seek
20 to admit in this trial?

21 MR. MOTLEY: Yes, Your Honor.

22 THE COURT: Do they know about what
23 documents?

24 MR. MOTLEY: Yes, Your Honor. They
25 were -- all three were attached to the

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1 memorandum. He's got them. And let me
2 address this first, this one first.

3 THE COURT: All right.

4 MR. MOTLEY: If I might, Your
5 Honor. This is 37 -- looks like -- yes,
6 sir, 93.

7 THE COURT: 3793 is part of the
8 John Hill papers. That's the
9 representation.

10 MR. MOTLEY: Yes, sir. It's
11 obviously more than 40 years old, occurred
12 at the time that we say the conspiracy was
13 birthed. It involves, Your Honor, here, the
14 planning committee, Your Honor, for the
15 members of the industry who were planning
16 the meeting that led to the Frank Statement,
17 which is right over here. He's agreed to
18 authenticity. I'm addressing now, Your
19 Honor, the relevance.

20 THE COURT: Right.

21 MR. MOTLEY: And this is, in fact,
22 the hatching of the conspiracy, and there is
23 a document that's attached to, Judge, that
24 is their interviews with --

25 May I approach, Your Honor?

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1 THE COURT: Yes.
2 MR. MOTLEY: The document itself
3 refers to these discussions. You'll note it
4 bears the statement "Historical Society of
5 Wisconsin," and you will note, Your Honor,
6 that to the members of the planning
7 committee, he makes reference to attaching
8 these talks with the research directors.
9 And then he identifies the research
10 directors with whom he had discussions.

11 And he has the notes of the discussions
12 with these research directors, including
13 Lorillard, Philip Morris, American Tobacco
14 Company, RJ Reynolds, although the RJ
15 Reynolds person was outside the company.

16 Your Honor, this document is extremely
17 relevant to the issues in this case.

18 THE COURT: You've offered two,
19 Counselor, which document?

20 MR. MOTLEY: A5260, I'm sorry, and
21 3793.

22 THE COURT: All right.

23 MR. MOTLEY: The other document is
24 also part and parcel of this whole trilogy
25 of events. And they're all about the same

3442

1 date. And I'll hand you the third one which
2 is 6045.

3 Again, I'm not suggesting these rulings
4 mean anything other than to illustrate other
5 courts have wrestled with this problem, Your
6 Honor, these documents have been admitted in
7 Mississippi, Florida, and Texas and
8 Minnesota.

9 I will address the relevance, if you
10 would like, Your Honor.

11 THE COURT: Let me ask defense,
12 first of all, is there an objection to these
13 three documents now they've been identified?

14 MR. OHLEMEYER: Yes, Your Honor, I
15 think it makes sense to look at them three
16 at a time, too, for this reason.

17 THE COURT: Excuse me, are these
18 the only documents you're going to offer out
19 of the John Hill papers?

20 MR. OHLEMEYER: They're the only
21 ones they've given me.

22 MR. MOTLEY: No, Your Honor, these
23 are the only three that we seek to admit in
24 this case that come from the John Hill
25 documents that weren't produced -- we had

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1 others, I'm now withdrawing them, because
2 they have some interdelineations and some
3 questions they've raised about authorship
4 and the like. These three we know who
5 authored them and if he challenges them I'll
6 be glad to show you how we know that.

7 THE COURT: Court understands
8 there's no issue as to genuineness,
9 authenticity.

10 MR. OHLEMEYER: There's no doubt
11 they came from the files where they say they

12 came from.
13 Here's my point, Your Honor, look at
14 5260, compare it to 3793. Your Honor, I
15 think, has consistently over our objection
16 determined that a document like 5260 is
17 admissible over a hearsay objection and over
18 an evidentiary foundation objection, despite
19 the fact that we've tried to convince you
20 that whether if John Hill says this does or
21 does not connect it to the case, you've been
22 proved consistent in letting this kind of
23 thing into evidence. Contrast that with
24 3793.

25 In 5260 we have people's names, we have
3444

1 quotes attributed to them, we have their
2 position identified at a particular point in
3 time.

4 In 3793 we have an unsigned, undated
5 memorandum that has a lot of quotes in it
6 that aren't attributed to anybody. So I
7 think Your Honor, I would suggest that there
8 is something different about 3793 in Rule
9 403 in addition to all the other objections
10 that suggest you should exclude 3793 even if
11 you were inclined to admit 5260 over our
12 objection.

13 MR. MOTLEY: Your Honor --

14 Are you done, Bill, I'm sorry.

15 MR. OHLEMEYER: Yes.

16 MR. WAGNER: I'm sorry, could I
17 just add for the record here, Judge?

18 THE COURT: Mr. Wagner.

19 MR. WAGNER: Both of these
20 documents, Plaintiffs' Exhibit 3793 and
21 5260, are also objectionable because they
22 contain multiple double hearsay throughout.
23 I mean, just a quick review of these
24 documents, Your Honor, the contents of these
25 two documents are essentially commentary by

3445

1 an unknown author about the motives and
2 thinking of other people. I mean, again,
3 they don't fall within the admissions
4 exception to the hearsay rule and, worse
5 yet, they contain double, probably even
6 triple hearsay as you continue to go through
7 it.

8 MR. MOTLEY: Your Honor, first
9 place, the ancient document rule cures all
10 of that that he just said. By definition, a
11 statement in a document that's more than 30
12 years ago is not hearsay by definition so
13 there's no such thing as a double hearsay.

14 If you want to look at the state --
15 what happened here, Judge, is that they
16 hired Hill & Knolton, and whether we admit
17 the oral history of Mr. Hill or not, it does
18 provide insight into the background of all
19 of this, Mr. Hill in this, I guess what we
20 now call an oral history, where somebody
21 comes and talks to an old timer and he
22 reflects back on his career and all, it's

23 called an oral history. It's an accepted
24 technique, but I'm not trying to press it in
25 the back door; but you can consider this as

3446

1 background if you want to.

2 Be that as it may, we know from the
3 four squares of the documents that there was
4 a planning committee; that the planning
5 committee led up, Judge, to what we have
6 here, the Frank Statement, which was issued
7 on January the 6th, 4th, or I can't remember
8 which date it was, 1954.

9 The Edward Darkin is the author of this
10 document, you can tell by reading the three
11 documents, he was the chief assistant to
12 Mr. John Hill.

13 You'll notice, Your Honor, on the 40
14 memo, the last page of the 40 memo, you see
15 his initials. EFD. And I will tell you,
16 the reason I know this, Judge, is because
17 Hill & Knolton has been a defendant in these
18 cases, has admitted this is a business
19 record of Hill & Knolton. And that
20 Mr. Darkin was chief assistant to Mr. Hill
21 and this is his document.

22 The planning committee, Your Honor,
23 included a tour, if you will, and he makes
24 reference to the fact that he went and
25 interviewed these, in 3793, he makes

3447

1 reference to having gone and seen the
2 research and development directors of the
3 various companies.

4 At page -- he refers to various
5 folders.

6 THE COURT: You're on 3793 now,
7 Counselor?

8 MR. MOTLEY: Yes, Your Honor.

9 THE COURT: You keep saying he.

10 MR. MOTLEY: Sir?

11 THE COURT: To whom are you
12 referring here?

13 MR. MOTLEY: Mr. Darkin, the author
14 of 3793.

15 THE COURT: How do I know that?

16 MR. MOTLEY: Because his initials
17 appear on the last page of the document.

18 Excuse me one second, I may --

19 MR. WAGNER: I don't see any
20 initials.

21 THE COURT: That was
22 Mr. Ohlemeyer's argument.

23 MR. MOTLEY: Well, I realize that
24 was his argument, Your Honor, but if you'll
25 look, look at page 3.

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1 THE COURT: I see initials at the
2 bottom of page 3.

3 MR. MOTLEY: Yes, sir. ED. That's
4 Edward Darkin. And it's admitted by Hill &
5 Knolton in their answers to interrogatories
6 which I'll give you from other cases that
7 Mr. Darkin was chief assistant. He signed

8 these initials, he says I'm the one that
9 travelled around and talked to these
10 research directors. The 5260 is, in fact,
11 his notes of his travelling around talking
12 to the research directors.

13 If you want to look at Mr. Wagner's
14 objection, which is not well taken because
15 of ancient document rule, you'll see that
16 these very same subject matters are covered
17 in his interviews with these very same
18 research and development directors. You see
19 the same names mentioned. It's a summary of
20 his visits with these various people.

21 So you have the name of the author,
22 Mr. Edward Darkin. I don't think now that
23 they've seen his initials they can
24 legitimately tell you, Your Honor, that
25 Mr. Darkin was not the chief assistant of

3449

1 Mr. Hill. And Your Honor knows how we
2 people type things up, that people have a
3 habit of putting their initials on things
4 from time to time.

5 Here you have the internal consistency
6 of the documents, that is, he refers to in
7 3793 to his interviews and his notes of his
8 interviews with research directors.

9 You got 5260 which, in fact, are those
10 notes of his meetings with the research
11 directors. And then if you'll look at --

12 Where's the other document?

13 6045, Your Honor, is referred to also
14 in the document, in 3793. He even lists who
15 was at the meeting that they had: Burt Goss
16 was a Hill & Knolton executive. He lists
17 who was at the meeting: Paul Hahn, Joseph
18 Coleman, O. Parker McCullis, J. Whitney
19 Peterson.

20 This document, Your Honor, I don't know
21 that this document has ever been excluded,
22 6045, from any trial, as far as I know. And
23 again, I just point that out, the Courts
24 have looked at these documents and found
25 them to be authentic.

3450

1 The reason I sent -- the whole reason I
2 sent somebody to the library to reassure
3 Your Honor these were authentic, and they
4 bear the stamp of the State Historical
5 Society of Wisconsin, they're in the
6 archives where, you know, the rule is if
7 it's 30 years old, is in a condition that
8 appears not to be suspicious, is a place
9 where, if found, it's likely to be
10 authentic, then it's authentic. And if it's
11 authentic it's not hearsay. And if it's
12 authentic and it's not hearsay, it's an
13 801(D)(2) admission.

14 And unlike the prior document where I
15 had a problem of proving to you it was in
16 furtherance of the conspiracy, this is the
17 hatching of the conspiracy, according to us,
18 the truth we've deduced so far, is in fact

19 the Frank Statement is the embodiment, very
20 embodiment of a conspiracy.

21 MR. OHLEMEYER: Here, Your Honor,
22 here's the difference. Here's why 6045 and
23 5260 are different than 3793.

24 The plaintiffs have proved -- or
25 attempted to prove that the Hill & Knolton
3451

1 organization was involved in forming this
2 organization. The sponsors of this
3 organization are listed here. And it
4 includes people who aren't parties to this
5 case, who aren't alleged to be or proved to
6 be successors or predecessors of anybody in
7 this case. And there are other people
8 involved in this.

9 The difference with 6045 and 5260 is,
10 is if you take -- if you believe everything
11 Mr. Motley says, you have quotes attributed
12 to people who can be connected to this
13 lawsuit.

14 In 3793, we have quotes that aren't
15 connected to people in this lawsuit, that
16 the evidence in the record to date suggests
17 could be just as likely connected to people
18 not related to the lawsuit. It's pretty
19 clear when these people wanted to connect
20 these statements to people, they did it.
21 They don't do it in this one. So I think
22 3793 is a distinctly different document and
23 at least Rule 403 suggests that it be
24 excluded as potentially confusing and
25 misleading.

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1 MR. MOTLEY: 3793, Your Honor, has
2 been the subject of written opinions by
3 various judges have looked at this. It is
4 the most relevant document we've got on the
5 conspiracy. It demonstrates what they were
6 trying to do, which was to reassure the
7 public, quiet their instinctive fears of
8 lung cancer, sets out what he did, what he
9 was assigned to do, what he did, he attaches
10 copies of his visits to all these research
11 and development directors.

12 It would be singularly, I respectfully
13 say, it would be singularly unfortunate,
14 Your Honor, of how this whole story was
15 birthed is left out because everybody who he
16 went to see didn't end up signing the Frank
17 Statement. You might also find out, because
18 I had to face this in a trial,
19 Mr. Baumgartner's testimony is in, RJ
20 Reynolds objected to 5 -- to 52 -- excuse
21 me, to 6045 on the grounds if you look, RJ
22 Reynolds wasn't there when they went to see
23 him. Everybody was there but them. And
24 that was admitted over their objection on
25 that. You see the present at the meeting

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1 here, everybody was there except for RJ
2 Reynolds. So they objected on the grounds
3 that, since they weren't there, they

4 couldn't use it against them. And the Court
5 found it was an ancient document, ended up
6 on the Frank Statement and, therefore, they
7 joined the conspiracy. Whether they were at
8 that meeting or not, they ended up signing
9 the embodiment of the conspiracy.

10 Judge, Your Honor, I know you try
11 criminal cases and we've got to start
12 somewhere with the conspiracy and this is
13 the birth of it.

14 Excuse me one second, Judge.

15 Your Honor, we're not moving to admit
16 these pre Frank Statements. But there are
17 four documents here that the same group of
18 people are signing on behalf of -- these are
19 what were drafts that led up to the Frank
20 Statement. And they're all part and parcel
21 of this whole collection of documents.

22 I'm not seeking to introduce them, but
23 Your Honor can consider them under Rule 104
24 as evidence that would go to the
25 authentication and legitimacy of 3793.

3454

1 Judge, there's no doubt that these are
2 legitimate documents.

3 THE COURT: I made a note earlier
4 and I think it's only fair that I have a
5 chance to review these documents in their
6 entirety. I'm not going to rule on this
7 until I read each and every document here.

8 MR. MOTLEY: May I give these to
9 you to read then, please.

10 THE COURT: Yes, sir, please.

11 MR. MOTLEY: 4601, 4722, 4721, and
12 4720.

13 THE COURT: Right here with these.
14 Thank you. Thank you. I'll take those
15 under advisement until tomorrow morning.

16 MR. MOTLEY: Judge, we got --

17 MR. OHLEMEYER: Excuse me, read
18 these one more time.

19 MR. MOTLEY: She'll give you a
20 copy.

21 MR. TRINGALI: Your Honor, can I
22 just note on the record that, on the holding
23 companies, I understand Mr. Motley's not
24 offering these documents --

25 MR. MOTLEY: I'm not.

3455

1 MR. TRINGALI: -- against the
2 holding companies, so I'm not going to make
3 an argument.

4 MR. MOTLEY: I'm not. I'm only
5 offering them against the people that
6 signed, who are in this courtroom, who
7 signed this ad.

8 THE COURT: All right.

9 MR. MOTLEY: I'm not offering them
10 against the Tobacco Institute or CTR or the
11 holding companies.

12 Judge, this Baumgartner thing, we need
13 to get edited, if I might be so bold and
14 suggest, if you have time, can we do that

15 next?

16 THE COURT: That was my next item.

17 MR. MOTLEY: I think their

18 objections can be distilled through their

19 insistence by saying he's not qualified, we

20 didn't offer him as an expert. He's a fact

21 witness. They claim hearsay within hearsay,

22 they claim it deals with emphysema, not lung

23 cancer, you've already overruled that

24 objection, goes to the hazardous nature of

25 the product, doesn't matter what disease

3456

1 we're talking about. He was offered only as

2 a fact witness. You'll see that from the

3 transcript. There's no hearsay. He was

4 there and observed what he observed and

5 stated what he stated. So the only

6 remaining objections, so far as I know, is

7 hearsay on 2354, line 6 through 15.

8 THE COURT: I read that.

9 MR. MOTLEY: And 2359, line 12 to

10 19. I mean, he's a percipient witness, Your

11 Honor. The fact that he's a scientist, too,

12 there's no question about it. But we didn't

13 ask him any opinions.

14 THE COURT: Mr. Wagner, you filed

15 the memorandum?

16 MR. WAGNER: Yes, Your Honor, and

17 the testimony in here, in the Baumgartner

18 testimony that plaintiff, of course, wants

19 to have admitted and to parade before the

20 jury is the statements by Mr. Baumgartner

21 about what somebody else told him about

22 emphysema.

23 It's very clear to me that that is a

24 hearsay statement, it's not a statement of

25 this witness, it's a statement by somebody

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1 else to him. And it can't be admitted

2 through this witness' testimony. If this

3 witness was here in the courtroom testifying

4 live, he couldn't testify to what somebody

5 else told him so how can they bring this in

6 here through a deposition?

7 MR. MOTLEY: What page are we

8 talking about?

9 MR. WAGNER: What page are we

10 talking about?

11 MR. MOTLEY: Yes, sir. So I can

12 find it here.

13 THE COURT: You're talking about

14 what page in the deposition, Counselor, or

15 what page in his memorandum?

16 MR. MOTLEY: No, sir. What page in

17 the deposition.

18 THE COURT: Page 2354, isn't it?

19 MR. MOTLEY: He's saying what now?

20 Well, the objection --

21 THE COURT: Wait a minute.

22 Mr. Wagner, were you done yet?

23 MR. WAGNER: No, sir.

24 MR. MOTLEY: Sorry.

25 THE COURT: Let's let him finish.

1 MR. WAGNER: Page 2354, as Your
2 Honor has already picked up. And there is
3 no issue in this case of emphysema.
4 Mrs. Wiley did not have emphysema. It's
5 prejudicial to allow testimony based upon
6 hearsay of this witness, this
7 Mr. Baumgartner, to testify through hearsay
8 about something that's not even an issue in
9 this case.

10 So the very basic heart of the
11 objections that we filed -- and I don't know
12 whether Your Honor has had a chance to look
13 at those closely or not -- are based upon
14 those propositions. And we've got, of
15 course, additional specific objections that
16 we've outlined in here. I don't know
17 whether Your Honor wants me to go through
18 those or not. But those are at the heart of
19 the objections here in terms of
20 Mr. Baumgartner's deposition testimony. If
21 he was here testifying live he wouldn't be
22 able to testify what somebody else told him.

23 MR. MOTLEY: Dr. Callucci, in the
24 transcript on page 2352, is identified as
25 the senior researcher at RJ Reynolds. A

1 statement of a person in the employment of
2 RJ Reynolds is not hearsay by definition.
3 It's an admission against interest. So it's
4 not even -- doesn't even fit the definition
5 of hearsay.

6 So I ask -- if I were to ask
7 Dr. Richmond like we did, did the president
8 of the Tobacco Institute say to you, well,
9 such and such a day such and such and he
10 said that's not hearsay, it's a statement
11 against interest. It's offered for the
12 truth of the matter but it's a statement
13 against corporate interest, a pecuniary
14 interest.

15 Here, Dr. Baumgartner's boss,
16 Dr. Anthony Callucci, shows him the
17 pathology slides and tells him what's in
18 there, which is emphysema, which brings me
19 to -- so it's not hearsay by definition,
20 which brings me to the next objection which
21 is emphysema.

22 Your Honor has consistently overruled
23 these objections where they try to be
24 disease specific. They want to have a
25 unitary disease rule. The issue in this

1 case is whether cigarette products are
2 dangerous beyond the contemplation of
3 ordinary consumers. Is it unreasonably
4 dangerous. And all the dangers incorporated
5 in a product are relevant to the inquiry of
6 whether or not it's dangerous beyond the
7 ordinary contemplation of consumers, in this
8 case, Ms. Wiley, a bystander of consumers.

9 So Judge it's not -- you've overruled
10 those objections consistently ever since

11 Dr. Roggli was here. You may recall we had
12 a lecture about emphysema by Dr. Roggli.

13 Now, the relevance of this, of course,
14 is that what they did was they dusted a
15 bunch of poor little rats and rabbits and
16 then when they started getting disease, they
17 shut the mouse house down.

18 There's another document that Your
19 Honor has already -- I think that you've
20 already admitted --

21 Have we presented a gentleman's
22 agreement yet?

23 There is another document, Your Honor,
24 that goes into this in detail but they tell
25 me we haven't offered it yet, so...

3461

1 In any event, what could be more
2 relevant to punitive damages than to
3 conspiracy, Your Honor, than a company that,
4 as Mr. Baumgartner describes, they're out
5 there perfectly happy doing research on rats
6 and rabbits, they show up with emphysema in
7 the rats and rabbits, the next thing you
8 know they gather up all the notebooks and
9 close the mouse house down and dismiss all
10 the employees. And Mr. Baumgartner said and
11 the testimony will be they never published
12 the first word about this.

13 MR. WAGNER: As usual, I think
14 Mr. Motley has not correctly stated the
15 record. It wasn't -- the deposition doesn't
16 even state that it was Dr. Callucci who made
17 the statement. Dr. Callucci is mentioned at
18 the top of page 2354, the witness says he
19 was in the company of Dr. Callucci.

20 MR. MOTLEY: Excuse me. That's
21 what I thought.

22 MR. WAGNER: At that time, it was
23 Dr. Johnson who explained it, not
24 Dr. Callucci.

25 MR. MOTLEY: The head veterinarian

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1 at RJ Reynolds, then, in the presence of
2 Dr. Callucci, the senior scientist.

3 MR. WAGNER: And all of this makes
4 a nice jury argument, Your Honor, but it
5 doesn't solve the evidentiary problem that
6 this deposition -- that this deposition has
7 in terms of its being read to this jury.

8 MR. MOTLEY: Judge, I just -- I
9 just don't understand how a statement, it
10 says here, Rule 801, "Statements which are
11 not hearsay," and it goes over, it says,
12 "statement by a party opponent."

13 THE COURT: All right. Thank you,
14 Counselor, I'll rule on that in the morning
15 also.

16 MR. MOTLEY: Your Honor, we're
17 probably going to have to start off with a
18 live witness, then, because we're going to
19 have to edit the tape. That's our only
20 problem. I'm not saying -- we can do that.
21 Last time I asked somebody to make a ruling

22 I didn't like what I heard, so -- so we'll
23 wait until the morning then, Judge.

24 THE COURT: I wanted to rule on
25 this tonight, Counselor, but I'm going to
3463

1 look at the deposition itself.

2 MR. MOTLEY: What we could do,
3 Judge, since there's only really two
4 objections here, I guess there's more than
5 that, the emphysema objection goes
6 throughout.

7 MR. WAGNER: We've got all the
8 specific objections.

9 THE COURT: I was just looking at
10 that. There's several objections.

11 MR. MOTLEY: We have no objections
12 to the cross so we're prepared, unless of
13 course, you know, if you rule in their
14 favor, we'll have to take a look at the
15 cross and see what should come out of there.
16 But we're satisfied, you know, if you let
17 the direct go, we're satisfied let the cross
18 go like it is.

19 THE COURT: Well, I'll rule on it
20 first -- in fact, probably be able to rule
21 on that by 8:00 tomorrow morning.

22 MR. MOTLEY: I'm sure I'll have
23 Ms. Flowers here bright and early, Your
24 Honor.

25 Judge, the only other thing that we
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1 don't need to discuss tonight but at some
2 point in time, remember I was trying -- I
3 wanted to introduce FDA findings of fact and
4 I didn't need to do it with that witness but
5 at some point in time tomorrow we need to
6 address, I think they object under -- we
7 offered the FDA's findings of fact, and
8 they --

9 THE COURT: I remember that.

10 MR. MOTLEY: -- they objected so at
11 some point tomorrow we need a few minutes to
12 argue that.

13 MR. OHLEMEYER: Two sentences on
14 that, Your Honor, if you want it. I think
15 if you look at 803-8 it doesn't fit within
16 the exception. It's not their regularly --
17 in fact, the evidence is that it is not
18 their regularly conducted activity to do
19 this kind of thing. It was actually a
20 special investigation of a particular case
21 or incident and under 803-8D I don't think
22 it's admissible over a hearsay objection.

23 MR. MOTLEY: Well, I'm prepared to
24 argue this tomorrow, Your Honor, it's late
25 in the day, I know you've been here since
3465

1 7:30 in the morning, I'm prepared to argue
2 why it fits.

3 THE COURT: Well, tell me briefly
4 why it fits.

5 MR. MOTLEY: Can I give you a brief
6 on this, Judge?

7 THE COURT: Sure. You have it
8 prepared?
9 MR. MOTLEY: Yes, sir.
10 THE COURT: All right.
11 MR. MOTLEY: Hasn't been signed
12 but -- I guess that means my staff is
13 ashamed of it or something. We'll do it in
14 the morning. They want time to look at it.
15 THE COURT: All right. We'll argue
16 this in the morning.
17 Anything else come before the Court?
18 Mr. Motley?
19 Mr. Ohlemeyer?
20 Mr. Wagner?
21 MR. OHLEMEYER: No, Your Honor.
22 THE COURT: Mr. Furr?
23 MR. FURR: Nothing for this
24 evening, Judge.
25 THE COURT: Have a good evening.

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1 (The proceedings were adjourned at 5:45
2 p.m. to be continued February 24, 1998, at
3 8:30 a.m.)
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